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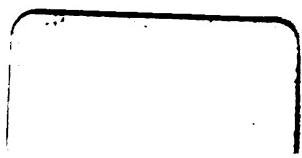
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WASHINGTON REPORTS
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CASES DETERMINED
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SUPREME COURT OF WASHINGTON

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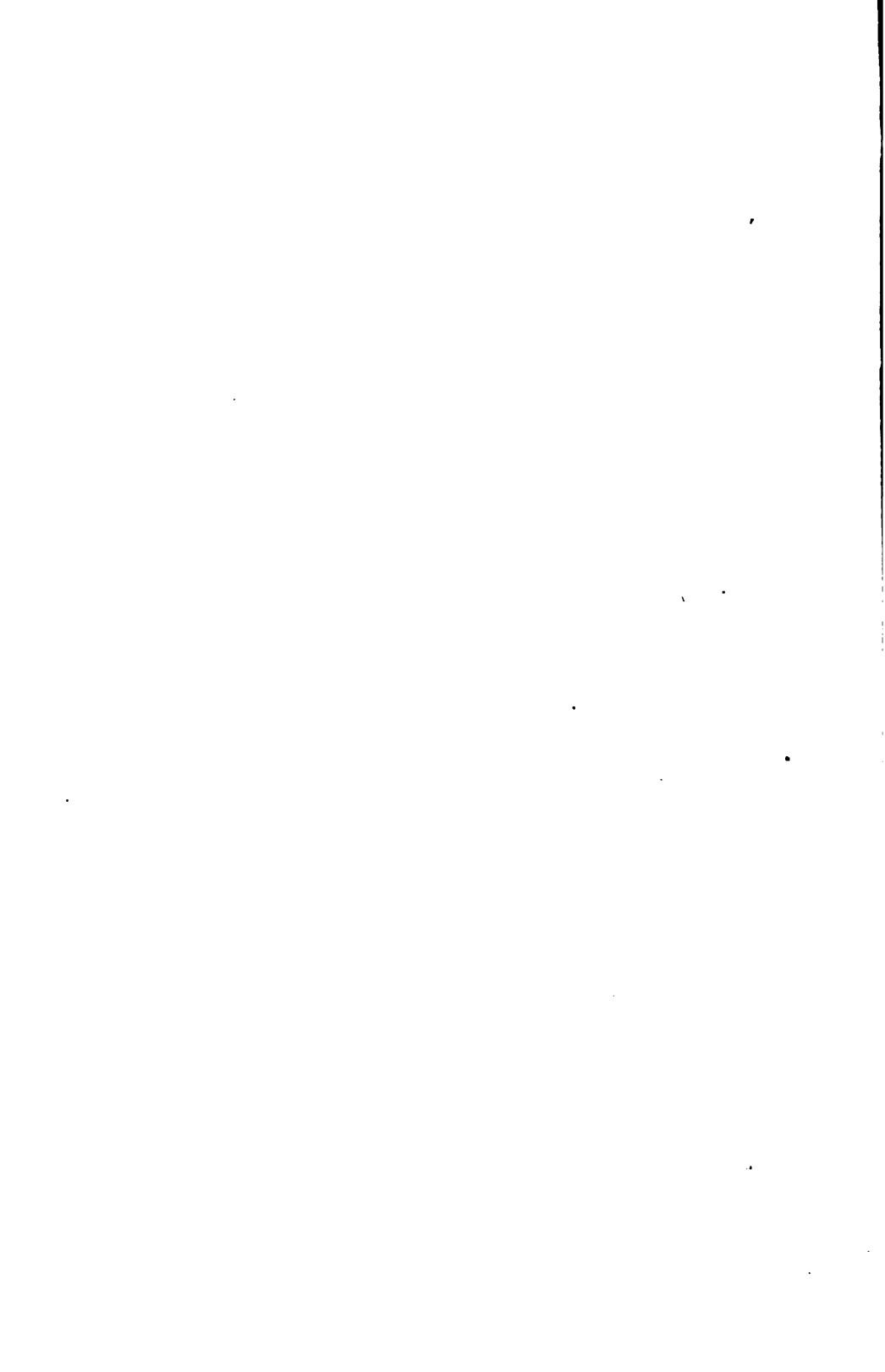
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ERRATA

- Page 268, 3d syllabus, line 2, for counsel read council
 Page 348, 3d syllabus, line 3, for contract read improvement
 Page 353, line 22, for 14,933 read 14,993
 Page 462, line 4, for 1886 read 1866
 Page 528, line 15, for Chapter read Charter



CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 7074. Decided March 17, 1908.]

THE STATE OF WASHINGTON, on the Relation of George W. Walter, Plaintiff, v. THE SUPERIOR COURT FOR WHITMAN COUNTY, Respondent.¹

JUDGMENT—ENTRY—HOLIDAYS. A final judgment entered on a judicial day is not void by reason of the fact that prior proceedings were had in the case upon a legal holiday proclaimed by the governor, where no objection was made at the time to such prior proceedings.

Certiorari to review a judgment of the superior court for Whitman county, Chadwick, J., entered November 1, 1907, granting a writ of mandamus to compel the registration of the names of certain qualified electors of a municipality. Affirmed.

Frank C. Owings and *E. K. Hanna*, for plaintiff.
Thomas Neill, for respondent.

Crow, J.—On October 17, 1907, one E. S. Burgan, a qualified elector of the city of Pullman, applied to the superior court in and for Whitman county for a writ of mandamus to compel George W. Walter, the city clerk, to register the plaintiff and other qualified electors, there being a dispute between them and the defendant as to the ordinance under

¹Reported in 94 Pac. 665.

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which, and the ward in which, they were entitled to registration. After issue joined, trial was commenced and evidence introduced on October 29, 1907. The cause was then adjourned to October 30, 1907, at which time additional evidence was admitted and arguments of counsel were made. On the morning of October 31, 1907, the trial judge prepared a written opinion, announcing his decision, and giving his reasons therefor. Copies of this opinion were forthwith delivered to the respective counsel and filed with the clerk. On November 1, 1907, the parties again appeared by their counsel, at which time findings of fact, conclusions of law, and a final judgment awarding a peremptory writ of mandamus were prepared, signed, and filed. The defendant interposed a motion for a new trial, which was denied. The annual municipal election was about to be held in the city of Pullman, and the city clerk, G. W. Walter, alleging he had no remedy by appeal, applied to this court for a writ of certiorari with an order of supersedeas, to review the judgment of the superior court. The writ was granted, but without any supersedeas. On the final hearing and review we, on November 11, 1907, concluded that the judgment of the superior court should be affirmed, but in the absence of any supersedeas, delayed this opinion until it could be reached in the regular order of business.

On the morning of October 30, 1907, the governor of the state of Washington, under authority of Bal. Code, § 4709 (P. C. § 5447), issued the following proclamation:

“Whereas, A proclamation was issued October 29, 1907, by the governor of Oregon declaring a legal holiday in said state extending through the week until Saturday, November 2, 1907;

“Whereas, It is made to appear that the closing of the Oregon banks by virtue of said proclamation will cause injury and embarrassment to certain banking interests of the state of Washington transacting business with certain banks of Oregon;

“Now, therefore, In order to protect the interests of the banks of the state of Washington so affected, I, Albert E

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Mead, governor of the state of Washington, by virtue of the authority in me vested, do proclaim Wednesday and Thursday, October 30 and 31, 1907, legal holidays.

"In witness whereof I have hereunto set my hand and caused the seal of the state to be affixed at Olympia, this thirtieth day of October, A. D. nineteen hundred and seven.

"By the Governor;

Albert E. Mead.

(Seal)

"Sam H. Nichols, Secretary of State."

The relator contends that October 30 and 31, thus declared to be holidays, were each *dies non juridicus*, on which judicial business could not be transacted; that the final judgment was based upon evidence admitted on such nonjudicial days; that the trial judge announced his decision on a legal holiday, and that the final judgment, which was subsequently signed and entered, was void. The record shows that the relator interposed no objection to hearing the cause on October 30 and 31; that the question here presented was not raised in the trial court by motion for a new trial or otherwise, but that it was first presented in this court. The respondent's attorney insists that the days named in the governor's proclamation did not become legal holidays except as to banking, financial and commercial matters; that they were judicial days, and that the governor was without authority to declare more than one holiday in a single proclamation. For the purposes of this opinion we will disregard these contentions and assume, without deciding, that both days mentioned in the proclamation were legal holidays in contemplation of Bal. Code, §§ 4709 and 4712 (P. C. §§ 5447, 5448). It is conceded that the trial was commenced on a judicial day; that the final judgment was prepared, signed, and entered on another judicial day; and that the other proceedings above mentioned occurred on the alleged holidays. It is shown that neither the trial judge nor the parties had actual knowledge of the governor's proclamation, prior to noon of October 31; that no daily paper was published in Colfax, the county seat; that the court and parties first learned of the proclamation through

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Spokane papers, and that at no time during the trial was objection made to holding court or to any of the proceedings. Undoubtedly the trial judge would have continued the cause until November 1 had he known of the proclamation. The relator, however, contends that the court and parties were presumed to have been aware of the proclamation which took immediate effect when issued, citing: *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606; *United States v. Norton*, 97 U. S. 164, 24 L. Ed. 907; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189.

The only question presented is whether the final judgment entered on a judicial day became void by reason of prior judicial proceedings conducted on the holidays, to which the relator at the time failed to object, or to which, in other words, he impliedly assented. There is much conflict of authority as to the validity of judicial proceedings conducted on holidays. The relator contends that the evidence admitted and the arguments made on the holidays were considered by the trial court in reaching the final judgment; that the hearing and consideration of such evidence and arguments were void judicial proceedings, which entered into the final judgment and avoided it also. In support of this position he cites, with others, the following authorities upon which he bases his principal arguments: *Davidson v. Munsey*, 27 Utah 87, 74 Pac. 431; *Lampe v. Manning*, 38 Wis. 673; *State v. Green*, 37 Mo. 466; *Merchants' Nat. Bank of Omaha v. Jaffray*, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316; *Poor v. Beatty*, 78 Me. 580; *Hemmens v. Bentley*, 32 Mich. 88; *Ex Parte Tice*, 32 Ore. 179, 49 Pac. 1038.

We have carefully examined these and all other cases cited by the relator, and find that in no one of them, except *Davidson v. Munsey*, *supra*, was the final judgment or order, alleged to be void, entered or made upon a judicial day, as in this case. In *Lampe v. Manning*, *supra*, relator's leading case, the cause was tried and the judgment was entered on a legal holiday. In *State v. Green*, *supra*, the giving of instruc-

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tions to the jury in a criminal case was commenced on Saturday night, but completed after midnight, thus running into Sunday. Objection thereto was urged in the lower court by motion for a new trial, and the supreme court of Missouri with much reluctance held that the final judgment of conviction was erroneous. In *Merchants Nat. Bank v. Jaffray* and *Poor v. Beatty*, *supra*, the orders claimed to be void were made and entered on holidays. In *Hemmens v. Bentley*, *supra*, a magistrate heard evidence on a judicial day, but made and entered the judgment on a holiday. In *Ex Parte Tice*, *supra*, the supreme court of Oregon held that the act of a trial judge in discharging a jury on Sunday when they had failed to agree, entitled the prisoner to be discharged, as he could not again be placed in jeopardy. This court, in *State v. Lewis*, 31 Wash. 515, 72 Pac. 121, on a similar state of facts, after discussing the *Tice* case, made a contrary ruling. With the exception of *Davidson v. Munsey*, *supra*, which by reason of our views hereinafter stated we disapprove, we have been unable to find any case based on statutes similar to our own in which a judgment entered on a judicial day, after a portion of the trial had been conducted without objection on a holiday, was declared void.

In *Glenn v. Eddy*, 51 N. J. L. 255, 14 Am. St. 684, the court, in discussing statutory holidays other than Sunday, said:

“The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their *status* to that of Sunday. ‘Holiday,’ in its present conventional meaning, is scarcely applicable to Sunday: *Phillips v. Innes*, 4 Clark & F. 234. It is applicable to all, and has long been applied to some of the days named. When the statute declares them to be legal holidays, it does not permit a reference to the legal *status* of Sunday to discover its meaning. For it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days

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named, from compulsory labor and from *compulsory* attendance upon courts, as officers, suitors, or witnesses. Its true interpretation will limit the prohibition with respect to the courts to such actual sessions thereof as would require such attendance."

Although our statute [Bal. Code, §§ 4709, 4712 (P. C. §§ 5447, 5448)], names Sunday as a holiday, we think its evident intention is that litigants shall not be compelled to try their causes on that day or any other holiday. There is no language in Bal. Code, § 4712, compelling us to hold a final judgment void simply because it may in part result from other preliminary judicial proceedings which, with consent or at least without objection, were conducted on a legal holiday. To do so would deprive the court of jurisdiction of the entire cause. Unquestionably it would be erroneous for a court to remain open and transact judicial business on a legal holiday, and we assume that no trial judge in this state would knowingly do so. If for any cause one should unwittingly do so, no objection being interposed by parties present, and a judgment should thereafter be entered on a judicial day, this court most certainly would not declare such judgment void on the complaint of a consenting litigant, who objects for the first time upon appeal or by writ of certiorari. Although we have found no case identical with this, the above principles have been substantially recognized by other courts and also by this court. In *Kaufman's Appeal*, 70 Pa. St. 261, it was held that a confession of judgment delivered to a magistrate on Sunday would not vitiate a judgment entered on the following Monday. In *State v. Duncan*, 118 La. 702, 43 South. 283, a criminal prosecution, it was held that a defendant, who without objection had proceeded to trial on a holiday, could not contend for the first time after conviction that the judgment against him was void. In *Ehrlich v. Pike*, 53 Misc. Rep. 928, 104 N. Y. Supp. 818, the controversy was referred to arbitrators who, after receiving evidence, met on Sunday, considered the cause, and decided upon an award, which was

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made, published, and delivered on the following Monday, but the appellate division of the supreme court of New York held the award valid. See, also, *Houston etc. R. Co. v. Harding*, 63 Tex. 162; *Bradley v. Claudon*, 45 Ill. App. 926; *Foster v. Toronto R. Co.*, 31 Ontario 1; *Latta v. Catawba Elec. & Power Co. (N. C.)*, 59 S. E. 1028.

In *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062, although it was conceded that legal service of a summons could not be made on a holiday, this court held the defendant estopped from denying the legality of service admitted by him upon a holiday. In *Stewart v. State Board of Medical Examiners*, 48 Wash. 655, 94 Pac. 472, the applicant Stewart, by collateral action and attack, endeavored to enjoin the state board of medical examiners from enforcing a judgment of the superior court of Pierce county, which he alleged was void because the trial judge had heard arguments on a demurrer and had directed the judgment on a legal holiday. He made no allegation that evidence was admitted or considered, that the final judgment was actually entered on a holiday, or that he had objected to any of the proceedings. The substance of his contention was that the preliminary judicial business transacted on a legal holiday avoided the final judgment, and that the court thereby so completely lost its jurisdiction of the cause that it had no authority to take further action therein. This court, however, in passing upon his contention, refused to declare the judgment void.

The judgment in this cause, which was entered on a judicial day, appears upon its face to be regular and without suggestion of invalidity. The relator by his own conduct consented to a trial on the two holidays, thereby waiving any inadvertent error or mistake of the trial judge. This being true, he is in no position to question in this court the validity of the final judgment, which is affirmed.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

FULLERTON, J., took no part.

[No. 7127. Decided March 17, 1908.]

**MINA GAUTHIER et al., Respondents, v. WOOD & IVERSON,
Appellant.¹**

MASTER AND SERVANT—NEGLIGENCE—OPERATION OF RAILROAD—DEFECTIVE COUPLING—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. The questions of negligence of the defendant and contributory negligence of the deceased and his assumption of risks, are primarily for the jury, and a verdict for plaintiffs, upheld by the trial court on motion for new trial, cannot be disturbed by the appellate court, where there was evidence that a coupling between the tender of a logging engine and a car was defective and that the defect could have been discovered by reasonable inspection; that in backing a train of cars up a grade, the coupling broke, and the deceased, a fireman, who was standing on the foot board for the purpose of applying sand to the rails, was caught and crushed between the tender and the logs on the car, it being ruleable for him to do so when sand was necessary; although the place was known to be a dangerous place, and the engineer had not ordered the sand.

APPEAL—REVIEW—HARMLESS ERROR. It is not prejudicial error to exclude evidence of a witness as to a warning of danger given to deceased, where subsequently another witness testified fully to the transaction and the same was not disputed but became an admitted fact in the case.

CONTINUANCE—GROUNDS—ABSENCE OF WITNESSES—NECESSITY OF SHOWING. It is not error to refuse a continuance to defendant asked for at 4:30 o'clock until the next day, in order to meet evidence of the plaintiff on reopening the case for the purpose of introducing evidence not proper in rebuttal, where the defendants failed to make any showing pursuant to Bal. Code, § 4977, as suggested by the court at the time, but merely stated that their witnesses had been excused and it would be necessary to hunt them up and consult with them.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 15, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for the death of a fireman employed upon a logging train. Affirmed.

Cooley & Horan, for appellant.

Sachs & Hale and *Brownell & Colclough*, for respondents.

¹Reported in 94 Pac. 654.

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Opinion Per Root, J.

Root, J.—This action was brought by the widow and minor children of Benjamin Gauthier, to recover damages on account of his death, which was occasioned while working as a fireman upon a logging train of appellant. From a judgment in the sum of \$15,000 in favor of plaintiffs, defendant appeals.

At the time of the accident in question, defendant's train had a crew consisting of the engineer, one brakeman, and Gauthier. The president of the road, one Wood, was with the crew at the time. The engine was one built purposely for logging and of the type known as "Climax." The coupling between the tender of the engine and the first car was composed of a metal pipe about seven feet long and three inches in diameter, the ends of which had been plugged with an iron or steel eye into which a bolt was dropped. A wooden beam was sometimes used in place of the pipe for the coupling. This connecting appliance is commonly called a "rooster." On the day in question the crew were attempting to back the train, consisting of three loads of logs and three sets of empty trucks, up a four and one-half per cent grade. The customary method of doing this work was as follows: The wheels of the truck farthest up the hill were blocked so as to prevent it from moving forward down the grade. The engineer would then move the engine slightly forward until all the "slack" in the connections between the trucks had been taken up. He would then reverse his engine, apply the steam, and endeavor to start the train by bumping one truck-load and overcoming its inertia, then projecting that truck against the next, and in this manner moving one after another until all should finally be in motion. On this occasion Wood and Gauthier were on the engine with the engineer when the train became "stalled," and the engineer ordered Gauthier to block the wheels, or made a suggestion that they should be blocked. Gauthier and Wood immediately left the engine, one on either side, and started for the rear of the train. Wood reached there and blocked the wheels on his side. It is uncertain

whether Gauthier put in a block. The engineer tried twice to back the train, but each time failed. He tried it a third time, when the rooster between the tender and the first car or truck "buckled" or bent so that the end of the tender was forced against the ends of the logs on the car. The engineer, realizing that something unusual had occurred, stopped his engine and went to investigate. He found Gauthier with his head crushed between the tender and the loaded car. Death had been instantaneous. At the rear of the tender was a foot board upon which Gauthier was standing when killed. He had evidently gone thereupon for the purpose of applying sand to the track from sand boxes attached to the rear of the tender. The levers by which the sand was applied were found turned and the sand running immediately after the accident. No one saw Gauthier go there, and his presence there was unknown to the engineer when he attempted to back his train. He had received no order at that time to apply the sand. An examination of the rooster revealed a defective welding which, under the unusual force applied by the engine, caused the "buckling." Logs had been sometimes known to slip upon the trucks and crush against the end of the tender, and it was for that reason regarded as a dangerous place, and Gauthier was aware of this danger, having been present when such occurrences had taken place, and had heard other people warned about being there.

The negligence charged against the defendant was that the rooster was defective, that the defect was one which could have been discovered by reasonable inspection, and that the load was too heavy to be backed up the steep grade in the manner and by the appliances employed at that time. The defendant interposed the defenses of contributory negligence and assumed risk. The principal contention of the appellant is, that Gauthier was guilty of contributory negligence; that he knew this was a dangerous place; that he was not in the line of duty in going there at the time of this accident; that he could have performed the duty of sanding, if necessary, without go-

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ing upon the foot board, and that he had gone of his own volition from the place where the engineer ordered him, and without the latter's knowledge, into a place of danger, unnecessarily. Respondents met this by evidence going to show that it was ruleable for the fireman to turn on the sand when he thought it was necessary, without waiting for a special order to that effect from the engineer; that it was impracticable and dangerous to apply and shut off the sand without climbing onto the foot board; that one standing upon the foot board could watch the slipping of logs, which was the principal danger to be apprehended, and jump at any time to avoid such danger. The sand was necessary at times to keep the wheels of the locomotive from slipping when pushing a heavy load up a steep grade, and was applied for this purpose.

Appellant claims that the engineer had not at this time ordered, and did not need, the sand, and that it was really a hindrance instead of a help. Respondents offered evidence to show that equally competent trainmen might differ as to whether the sand was necessary in a given instance, and that the fireman being along by the side of the train could see the condition of the track and judge of the necessity for sand even better than the engineer, who, on account of his position, could not see the rail when they were backing the train. The evidence on the issues presented was extensive, and we do not believe it would serve any good purpose to analyze it in detail. There was a sufficient amount of competent evidence to sustain a finding of negligence on the part of the appellant. The defenses of contributory negligence and assumed risk, being of an affirmative character, could be sustained only by a preponderance of the evidence. There was a substantial amount of competent evidence tending to establish contributory negligence and the defense of assumption of risk, and sufficient if the same had been accepted by the jury. But there was also a substantial amount of competent evidence tending to defeat each and both of these defenses. In a con-

flict of this kind, the question becomes primarily one for the jury, and its finding is usually conclusive unless disturbed by the trial court. There being, upon the material issues in this case, a substantial conflict in the evidence, and room for a difference of opinion among men of reasonable minds as to what the evidence establishes, we cannot disturb the verdict even though we might not agree with all the findings of the jury. In such a case the law places the responsibility upon the jury and the trial court, and does not permit the appellate court to disturb their conclusion.

The appellant offered the testimony of one Payne to show that one of the officers of the company, at a time previous to the accident, ordered one of the other employees out from between the loaded car and the tender, telling him the place was dangerous, such warning being given in the presence and hearing of Gauthier. This testimony was excluded by the court, and its exclusion is assigned as error. We think the ruling of the court was erroneous, but do not think it constituted reversible error, for the reason that subsequently another witness was permitted to testify fully to the transaction referred to and no evidence was introduced or effort made to in any way dispute the correctness of the testimony thus offered. It therefore became virtually an admitted fact in the case.

Upon the rebuttal respondents offered certain testimony which was objected to as not being proper in rebuttal. The objection was sustained. Thereupon respondents' attorneys asked to have the case reopened for the purpose of introducing this testimony, which had reference to the character of certain appliances. The court granted this request and respondent put in the evidence desired. This occurred at about 4:30 o'clock in the afternoon. Thereupon the attorneys for appellant requested a continuance until the next morning, stating to the court that their witnesses, by whom they had expected to meet this evidence, had been excused and had left the courtroom, and that it was necessary to find and consult

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with them before defendant could meet the evidence just introduced. The presiding judge stated that the court could not adjourn to give parties an opportunity to hunt up their witnesses ; that they should have been kept at hand until the trial was finished. He, however, suggested to appellant's attorneys that a showing be made. Whereupon appellant's attorneys stated that they would make no further showing. The motion for a continuance was then denied. Bal. Code, § 4977 (P. C. § 591), provides the method of making a showing for a continuance. No compliance was made with the provisions of this statute ; and although we are inclined to think that appellant was entitled to a continuance, had it made the showing in the manner provided by the statute, or in any manner suggested by the trial court, yet we cannot hold the ruling of the court erroneous in the absence of such a showing.

Several other assignments of error are presented touching matters of instructions and the introduction or exclusion of evidence. We have examined them all, but fail to find any reversible error. The judgment of the honorable superior court is therefore affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

[No. 7067. Decided March 17, 1908.]

H. B. KENNEDY *et al.*, *Appellants*, v. F. E. ANDERSON,
Respondent.¹

FRAUDS, STATUTE OF—ORAL AGREEMENT TO CONVEY LAND—PART PERFORMANCE—ESTOPPEL. There is such part performance of an oral contract to purchase land for another as to take the same out of the operation of the statute of frauds, where it appears that a member of a firm was orally employed upon a stated consideration to secure a sale of county property and bid it in for the purchaser; that, without the purchaser's consent, he took the deed in the name of his partner; that the purchaser went into possession and made permanent improvements by erecting buildings, and maintained possession for two and one-half years, without any protest or objection from either of the partners, who knew that the purchaser was relying upon the oral agreement, and who delayed accepting tender of the amount paid from time to time without questioning the purchaser's right to the land; as they would be estopped from setting up the statute of frauds.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 11, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for the possession of real estate. Affirmed.

A. C. Macdonald (*Morris, Southard & Shipley*, of counsel), for appellants, cited: 2 Story, Equity Jurisprudence, 1201a; Bispham, Principles of Equity (3d ed.), 80; Perry, Trusts (4th ed.), art. 134; *King v. Boston*, 4 East 572; *Levy v. Brush*, 45 N. Y. 589; *Burden v. Sheridan*, 36 Iowa 125; *Perry v. McHenry*, 13 Ill. 227; *Walter v. Klock*, 55 Ill. 362; *Minot v. Mitchell*, 30 Ind. 228; *Fox v. Heffner*, 1 Watts and S. (Pa.) 372; *Jackman v. Ringland*, 4 Watts and S. (Pa.) 149; Bal. Code, §§ 4517, 4518 (Pierce's Code, §§ 4435, 4436); *Nichols v. Opperman*, 6 Wash. 618, 34 Pac.

¹Reported in 94 Pac. 661.

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162; *Brewer v. Cropp*, 10 Wash. 136, 38 Pac. 866; *Chamberlain v. Abrams*, 36 Wash. 587, 79 Pac. 204.

John Arthur and *R. G. Hutchinson*, for respondent.

HADLEY, C. J.—This is an action for the possession of real estate. The plaintiffs are husband and wife and allege that the land is their community property. Several persons were made defendants, but all of them except F. E. Anderson disclaimed any interest in the land and were dismissed from the action. Said F. E. Anderson also disclaimed any interest in a part of the land described in the complaint, but asserted an interest in the remainder. The cause was tried by the court without a jury, and judgment was rendered in favor of defendant Anderson's contention, from which the plaintiffs have appealed.

No record of the evidence has been brought here, and the facts as found by the court are therefore the established facts on this appeal. The material facts are as follows: Throughout the month of April, 1903, and at all times since, the appellant H. B. Kennedy and one Gasaway were, and have been, copartners as investors in lands and in tax titles to lands, with their office in the city of Seattle. On the 15th day of said month the respondent employed said Gasaway orally to secure for him, through a sale by King county, the land in controversy. It was orally agreed between them that the respondent should make written application to the board of county commissioners of King county to have the land sold, and that Gasaway should attend the sale and purchase the land for respondent, he to receive from respondent for his services in so doing \$25 for each of two described tracts. On the 6th day of May, 1903, respondent made such application and the same was received and filed by the board. Thereafter the board offered the tracts for sale along with other lands, and on the 11th day of June, 1903, they were sold by the county and purchased by Gasaway, who paid for

one tract \$200 and for the other \$20. Gasaway, without the knowledge or consent of respondent, fraudulently procured the making of a deed conveying the two tracts, with other lands from the county, to appellant H. B. Kennedy, who accepted the deed, and Gasaway and said appellant caused it to be duly recorded.

Soon after the sale respondent tendered to Gasaway the aforesaid amounts paid for the two tracts, and also the agreed amount for his services, and respondent thereafter frequently asked for a settlement, but Gasaway always said that he first wanted to see "the old man," meaning his said partner, the appellant H. B. Kennedy. On the 19th of December, 1905, respondent made a demand in writing upon Gasaway for such settlement, and for a deed to the two tracts, and with the demand tendered to him in lawful money the sum of \$312, which sum comprised the \$220 purchase money, \$50 for the services of Gasaway, and interest on the whole amount of \$270 at six per cent per annum from June 11, 1903 to the date of the tender and demand. Gasaway refused to accept the tender and failed to procure a conveyance to respondent. Respondent renewed the tender in court with his answer in this case, adding thereto a sum sufficient to pay appellant's costs of dismissing the suit and also interest upon the principal sum to August 11, 1906. The two tracts contain fifty acres and are of the reasonable value of \$25 per acre.

Ever since the said 11th day of June, 1903, respondent has been, and still is, in the possession of the two tracts, and has made valuable improvements of a permanent character thereon, including the building of three dwelling houses, a blacksmith shop, a barn, and the cultivation of a garden, all of the reasonable value of \$300. All the improvements were made with the full knowledge of the appellant H. B. Kennedy and of said Gasaway, without protest or objection from either of them and with full knowledge on their part that respondent had established his home upon said lands and

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was residing thereon, claiming to be the owner thereof. From the above facts the court concluded that the appellants hold the two tracts in trust for respondent; that if appellants do not voluntarily convey the tracts to respondent by good and sufficient deed, the court should appoint a commissioner to make such conveyance, and that the money paid into the registry of the court by the respondent should be held subject to the order of appellants and Gasaway. Judgment was accordingly entered.

The only question presented by the appeal is whether the facts sustain the conclusion and judgment. Appellants contend that they do not, for the reason that the contract was oral and that it cannot be enforced because of the statute of frauds. A number of authorities are cited to the effect that an oral contract of the character of the one before us does not create a trust which is enforceable. The cases cited, however, treat of the application of the statute of frauds to such contracts without the presence of the element of part performance. This court has adhered to the rule that, where a party has materially changed his situation by a part performance on the faith of an oral agreement, it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute of frauds. *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Jomsland v. Wallace*, 39 Wash. 487, 81 Pac. 1094.

The facts above recited show a clear case of part performance in good faith, relying upon an oral agreement. Respondent's offer in the first place to pay the amount of the purchase money was not refused, but delay was made from time to time upon the simple excuse that the agent wished to confer with the appellant H. B. Kennedy, his partner. For two years and a half respondent was permitted to occupy the lands and to continue making his improvements, appellants knowing meanwhile that he relied upon the agreement and asserted his ownership. In the meantime they neither claimed the land nor sought to disturb respondent's

occupancy or the making of the improvements. Under such circumstances they are estopped to urge the statute of frauds.

The judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

[No. 7163. Decided March 19, 1908.]

BEVERLY R. MASON *et al.*, Respondents, v. MARTIN LONG *et al.*, Appellants.¹

BOUNDARIES—DESCRIPTION IN DEED—PLATS—SHORTAGE IN BLOCK. The grantees in a deed conveying land in a block by metes and bounds, which description would be coincident with the south half of lot number eleven, in case all the lots were 60 feet in width as stated on the plat, are not entitled to have their title quieted as against owners of the adjoining lot number ten, upon the mere claim that there was a shortage in the length of the block which, if evenly distributed among all the lots, would make the metes and bounds description cover part of lot ten, where there was no definite proof as to the location of the shortage or as to the lots affected thereby.

QUIETING TITLE—DECREE. In an action to quiet title, the plaintiffs are not entitled to any decree where they fail to show any actual conflict between their claims and those of the defendants.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 14, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

F. F. Randolph and Metcalfe & Jurey, for appellants.
Jas. A. Dougan, for respondents.

HADLEY, C. J.—This is an action to quiet title. The plaintiffs allege that they are the owners in fee simple of a tract of land described as follows: Commencing at a point ninety feet south of the northeast corner of block 6 in

¹Reported in 94 Pac. 646.

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Burke's Second addition to Seattle, running thence south along the east marginal line of said block 6, thirty feet, thence west one hundred and twenty feet to the center line of said block 6, thence north thirty feet, thence east to the point of beginning. The complaint alleges that the land lies in the easterly half of said block 6, and that said half block, according to the recorded plat thereof, counting from the south end of the block, is made up of lots 7, 8, 9, 10, 11, and 12, the dimensions of each of said lots being sixty feet north and south and one hundred and twenty feet east and west. It is also alleged that, although the block appears by the original plat to be three hundred and sixty feet in length, it is in fact but three hundred and forty feet in length; that at one time one Harry White and wife were the owners of lots 10, 11, and 12, and that in order to avoid the shortage of twenty feet in the block, said White conveyed by metes and bounds to one John Booth the northerly ninety feet of the easterly half of the block, and to the plaintiff Beverly R. Mason the thirty feet adjoining thereto on the south as aforesaid; that the said two conveyances transferred from White and wife the northerly one hundred and twenty feet of the easterly half of the block.

According to the plat the property transferred by the two conveyances was identical in extent with lots 11 and 12, that conveyed to plaintiffs being identical with the south thirty feet of lot 11; but the plaintiffs allege that, after said conveyances were made, the only part of said lot 10 remaining to White and wife was the south forty feet thereof, which was by the last-named description conveyed to defendant Martin Long. It is averred that notwithstanding the fact that the conveyance was made to plaintiffs by metes and bounds, yet the county has at all times designated upon the tax records the property owned by plaintiffs as the south half of lot 11 in said block 6, and has demanded of plaintiffs the payment of the taxes thereon; that the plaintiffs have paid all taxes demanded of them, believing at all times that in

so doing they were paying in full upon their property as first above described; that regardless of the fact that the two conveyances aforesaid were made by metes and bounds, and that the south forty feet of lot 10 was conveyed to defendant Long, yet the county has each year erroneously continued to levy taxes against the north twenty feet of lot 10. Allegations are also made to the effect that, for an alleged delinquency in the payment of taxes on the said north twenty feet of lot 10, such proceedings were had that, in due course after foreclosure, one Totten became the purchaser thereof at tax sale, and he afterwards conveyed the same to defendant Mary Long, the wife of defendant Martin Long; that by reason of the foregoing alleged facts there has been no such description as the north twenty feet of lot 10 assessable for more than sixteen years, and that the defendants Long, by reason of said void tax title, are claiming the ownership and are in possession of a part of plaintiffs' land. The answer of defendants is to the effect that they claim to be the owners of the whole of lot 10; that plaintiffs have no interest in said lot and are entitled to no relief in this action. The cause was tried by the court without a jury, and the court entered a decree quieting the plaintiffs' title to the property as described by their metes and bounds description, and also specifying that the title is quieted as against any claims of the defendants Long by reason of the tax deed aforesaid. The defendants have appealed.

The real question presented by the appeal is whether the respondents have shown themselves to be entitled to any relief. The court in its findings of facts found, and properly so under the pleadings and evidence, that the property conveyed to respondents by their metes and bounds description is, according to the plat, the same as, and is coincident with, the south thirty feet of lot 11 in block 6. If the property conveyed to respondents is confined to the limits of lot 11, there is then no conflict between them and the appellants, for the latter make no claim as against anything in lot 11, their

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claim of ownership being confined wholly to lot 10. Respondents' metes and bounds description refers directly to the plat. It begins with reference to the corner of a block in the plat as the initial point, and the measurements show that, from the extent of the block and the size of the lots as shown by the plat, the description must cover the south thirty feet of lot 11 and no other territory. It is true the respondents alleged that, although the plat shows the block to be three hundred and sixty feet in length, yet it is in fact but three hundred and forty feet long. There is, however, neither allegation nor proof as to where the shortage occurs. A witness testified that he measured the block from one corner to the other and found it to be three hundred and forty feet in length. But it is not shown that the shortage is applied to any given lot or lots. If such distance of three hundred and forty feet were evenly divided, as would supposedly be true from the method of platting, then each lot in this half block would be fifty-six feet and eight inches wide, instead of sixty feet. If that were true, then the beginning point of respondents' description, being ninety feet from the northeast corner of the block, would make the description include twenty-three feet and four inches of lot 11, and six feet and eight inches of lot 10. Respondents allege in their complaint that, after White and wife had conveyed the northerly one hundred and twenty feet of the half block by their metes and bounds descriptions, there remained to them but the south forty feet of lot 10. If, however, the lots were all fifty-six feet and eight inches in width, then there was left to White and wife fifty feet in lot 10 instead of forty feet, as contended by respondents. Thus we see that, in the absence of definite proof as to the location of the shortage, respondents are merely speculating as to what lots it affects.

The plat states upon its face that all full lots are sixty by one hundred and twenty feet, and that "fractional lots are as shown on this plat." All the lots in the block mentioned are indicated upon the plat as being sixty feet in

width. If it be true that the indication upon the plat is an error and that there is in fact one or more fractional lots in the half block, then such fractional lot or lots must be located by definite allegation and proof, and it must appear that respondents metes and bounds description affects lands in such fractional lots before they are entitled to ask relief. Without such a showing it must be held, according to the dimensions shown by the plat, that respondents' land as described lies wholly within lot 11, and that their description does not conflict with appellants' tax title to the north twenty feet of lot 10. The trial court did not find that there is any actual conflict between the two descriptions, but it entered a decree quieting respondents' title to whatever land is included in their description, and especially decreed that their title to the land so described shall be quieted as against any claim by reason of appellants' tax deed. Appellants argue that the inference is to be drawn from the decree that respondents' description extends into lot 10 and conflicts with appellants' tax title. Such is probably true. If the court's finding that the land included in respondent's description is the same as, and coincident with, the south thirty feet of lot 11, had been expressly carried into the decree by recital, then perhaps such inference would have been negatived upon the face of the decree. As the decree stands, however, some confusion may arise, and inasmuch as we have seen that respondents have not shown any actual conflict with appellants, we believe they should be denied any decree in the premises.

The judgment is therefore reversed, and the cause remanded with instructions to vacate the decree and enter judgment that respondents shall take nothing by their action.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

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Opinion Per Crow, J.

[No. 6878. Decided March 19, 1908.]

H. A. ROBERTS, *Respondent*, v. E. H. STANTON COMPANY,
*Appellant.*¹

CORPORATIONS—OFFICERS—SALARY—FAILURE TO PERFORM SERVICES—TORTIOUS ACTS PREVENTING PERFORMANCE—LIABILITY FOR. The secretary of a corporation is not entitled to recover salary for two months during which he remained away and performed no services, where it appears that he had sold all his stock in the corporation except one share and had organized and acquired an interest in a rival concern, and that the manager had demanded that he resign or sell out his interest in the rival concern; since his conduct indicated that he had elected to comply with such demand; and in any event the corporation would not be liable for the tortious acts of the manager in preventing performance of the services, in the absence of authority or ratification by the corporation.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered February 8, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contract of employment. Reversed.

Merritt, Oswald & Merritt, for appellant.

Samuel R. Stern, for respondent.

Crow, J.—Action by H. A. Roberts against E. H. Stanton Company, a corporation, to recover two months' salary. The plaintiff alleged that in January, 1906, he was elected secretary and treasurer of the defendant corporation, for one year, at a salary of \$175 per month; that he discharged his duties until July 24, 1906, when the defendant, through its manager, E. H. Stanton, prevented him from further performing such duties; that the manager threatened him with bodily injury if he continued, and that the defendant refused to pay his salary for July and August, 1906. The defendant denied the alleged wrongful acts of the manager, and affirma-

¹Reported in 94 Pac. 647.

tively pleaded that during the months of April, May, June, and the early part of July, 1906, the plaintiff organized and promoted a company known as the "Sand Point Meat Company," to do business as a competitor of the defendant; that about July 14, 1906, E. H. Stanton, manager of the defendant, informed plaintiff that he was devoting too much time to the Sand Point Meat Company; that unless he withdrew therefrom and ceased competing with the defendant, his resignation would be asked; that a meeting of the trustees would be called to ask his resignation; that immediately thereafter plaintiff left defendant's place of business, and that he has ever since failed to perform his duties. Upon findings made, the trial court entered judgment in favor of the plaintiff. The defendant has appealed.

Respondent has moved to strike appellant's brief and affirm the judgment. The motion being without merit is denied.

Several assignments of error have been urged, but we will only consider the appellant's contention that the evidence does not sustain the findings and judgment. The undisputed evidence shows that the respondent was secretary and treasurer; that E. H. Stanton was president and manager of the appellant corporation; that they were elected to their respective offices in January, 1906; that they were trustees and stockholders; that there were three other trustees; that respondent performed his duties without interference until July 14, 1906; that about June, 1906, respondent sold all his stock in the appellant corporation with the exception of one share; that about the same time he acquired a one-third interest in the Sand Point Meat Company, paying \$750 therefor; that the new company was doing business at Sand Point, Idaho, about seventy miles from Spokane, in a territory where it would come into direct competition with appellant's business; that on the 18th of July, 1906, some controversy arose between respondent and E. H. Stanton, the manager, in which Stanton told respondent he should either dispose of his interest in the new company or quit as secretary and treasurer of the

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appellant company; that thereafter respondent was at appellant's place of business one evening to help two of its trustees prepare a financial statement, and once to collect a note which he held against appellant; that neither respondent nor any other person called a meeting of the trustees to pass upon the differences between him and the manager; that no such meeting was held; that respondent was not discharged by any order of the board, and that the trustees never interfered with him in the discharge of his duties. On other points the evidence was conflicting. Respondent testified that Stanton had threatened him with serious bodily injury if he returned to work after July 14. This was denied by Stanton, whose evidence was that he told respondent to dispose of his interest in the Sand Point Meat Company or resign his office as secretary and treasurer of the appellant, and stated that he would call a meeting of the board of trustees to demand his resignation. Respondent said he went to appellant's place of business to tender his services at one time other than the two occasions above mentioned. This was also denied by Stanton. The trial court concluded that respondent's evidence of threats made by Stanton was corroborated by the fact that he thereafter remained away, and that the further fact of the trustees' failure to hold a meeting and pass upon respondent's rights was a ratification of the manager's wrongful acts in driving him away.

We regard this as a mistaken view of the evidence and facts. Respondent did not contend that the manager had authority to discharge him, nor was there any evidence that he did have such authority. This being true, Stanton's acts, if they occurred as respondent testified, were wrongful and tortuous. Respondent was also an officer and trustee of the corporation. He knew his own authority as well as that of Stanton. He remained away after July 14, without insisting on any meeting or action of the trustees. If the trustees knew of the disputes and differences between respondent and Stanton, they also knew of respondent's interest in the Sand

Point Company. His conduct indicated that he had elected to retain that interest and comply with Stanton's demand by quitting appellant's employ. In any event, appellant did not become liable for Stanton's wrongful and tortious acts committed without its authority, unless it afterwards ratified and approved them. It has not been shown that it did so, and in the absence of such showing respondent cannot recover. Respondent, however, cites *Nickelson v. Cameron Lumber Co.*, 39 Wash. 569, 81 Pac. 1059, to sustain his contention that the appellant became liable for the wrongful acts and torts of its manager. In that case, however, the official of the corporation who committed the tortious acts was its general manager and statutory agent, having full charge of all its business in the state of Idaho. The corporation knew of his wrongful acts and approved the same. That action was prosecuted against the corporation by a stranger, not by an officer and stockholder for the torts of another officer and stockholder as in this case.

The judgment is reversed, and the cause remanded with instructions to enter judgment in favor of the appellant.

HADLEY, C. J., MOUNT, Root, and FULLERTON, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

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Opinion Per Crow, J.

[No. 6879. Decided March 19, 1908.]

**BESSIE CHILDS *et al.*, Respondents, v. WILLIAM O. CHILDS,
Appellant.¹**

LIBEL AND SLANDER—TRIAL—INSTRUCTIONS—ASSUMPTIONS — COMMENT ON FACTS. An instruction in an action for slander upon the subject of justification, "if the jury should find that the defendant was provoked to speak the slanderous words," to which the court added that it was based "on the assumption that you find the words were uttered," is not objectionable as assuming that the words were uttered, or as an unlawful comment on the facts.

TRIAL—INSTRUCTIONS—ISSUES RAISED BY EVIDENCE. It is not error to instruct upon the issues raised by evidence admitted without objection, although the same may not have been raised by the pleadings.

SAME—INSTRUCTIONS AS TO PREPONDERANCE OF EVIDENCE. An instruction requiring proof of a certain fact by the preponderance of the evidence, and authorizing recovery if such fact is proved to the satisfaction of the jury, is not objectionable as authorizing a recovery upon proof to the jury's satisfaction without proof by the preponderance of the evidence.

LIBEL AND SLANDER—DAMAGES—EXCESSIVE VERDICT. A verdict for \$750 for slander by the utterance in a public street in the presence of numerous persons, of words questioning the chastity of a woman is not excessive.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 15, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for slander. Affirmed.

Merritt, Oswald & Merritt, for appellant.

Belt & Powell, for respondents.

Crow, J.—Action by Bessie Childs and Charles O. Childs, her husband, against William O. Childs, to recover damages for slanderous words, alleged to have been spoken of the

¹Reported in 94 Pac. 660.

plaintiff Bessie Childs. From a judgment in favor of the plaintiffs, the defendant has appealed.

The evidence shows that the respondent Charles O. Childs and the appellant, William O. Childs, are half brothers, between whom much bitter feeling had existed, and that on the streets of Spokane they had a fight, during which appellant, within the hearing of numerous persons, uttered of and concerning Bessie Childs words which were actionable *per se*. The jury by their verdict found that the words were uttered, and the evidence sustains their finding.

The trial court in part instructed the jury as follows:

"You are instructed that anger is no justification for the use of slanderous words, and if you should find that the defendant was provoked to speak the slanderous words by any act of conduct of the husband, Chas. O. Childs, that would be no justification or excuse for speaking the slanderous words of and concerning the wife Bessie Childs, and should not be considered by you in mitigation of the damages, if any, suffered by her. Of course, that is based on the assumption that you find these words were uttered."

Appellant contends that by this instruction the trial judge *assumed* that the slanderous words were spoken; that he only submitted to the jury the question whether appellant was provoked to speak them; that in effect he said, "I assume that you will find the slanderous words were spoken, and if you find that Charles O. Childs provoked William O. Childs to speak them, that fact is not to be considered by you in mitigation of damages." Having made this interpretation, appellant further insists that the instruction was a comment on the facts, made by the court in violation of § 16, art. 4, of the constitution. We think appellant's counsel do not correctly interpret the instruction. The context shows that the trial judge, in effect, said: "Of course, that is based on the condition that you, the jury, after weighing all the evidence yourselves, find these words were uttered." The instruction, considered in its entirety and in connection with other instructions given, conveys no other idea. The jury could not have understood

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that the trial judge was informing them that he himself assumed or believed the words had been spoken. In other instructions the jury were explicitly told, in unmistakable language, that they themselves must determine from all the evidence whether the words had been spoken as alleged.

The answer to the complaint, which alleged the speaking of slanderous words, consisted of denials only. Under the issues thus presented the appellant contends it was error to instruct the jury on the questions of provocation or justification; that no issues of provocation or mitigation of damages were presented, and that instructions must be confined to the issues raised by the pleadings. The language alleged, if uttered, reflected upon and questioned the chastity of the respondent Bessie Childs. There was evidence tending to show that, during their fight, Charles O. Childs called the appellant a "rape fiend"; that thereupon the appellant spoke of and concerning Bessie Childs the slanderous words upon which this action is based. This was the evidence of both parties admitted without objection from appellant. The cross-examination of respondents' witnesses and the testimony given by appellant himself show that, on the trial, he was contending that he had been provoked by the language and acts of the respondent Charles O. Childs. The trial judge framed his instructions not only with reference to the issues raised by the pleadings, but also with reference to those presented by the evidence. It was proper to instruct the jury on the issues raised by the pleadings and the evidence. It is difficult to understand how the instruction complained of was prejudicial to appellant.

The trial court further instructed the jury as follows:

"You are instructed that, in this action, to authorize the plaintiffs to recover, that they must prove, by the preponderance of the evidence, that the defendant falsely spoke of and concerning the plaintiff Bessie Childs substantially the words charged in the complaint, and when plaintiffs prove to the satisfaction of the jury that defendant falsely spoke or uttered of and concerning the plaintiff Bessie Childs the

words charged in the complaint, then they may recover such damages as they may have sustained."

Appellant now complains of the words, "when plaintiffs prove to the satisfaction of the jury that defendant falsely spoke," etc., and urge that the instruction should have told the jury to find the facts upon all the evidence, and that the allegations upon which respondents relied must be proven by a preponderance of the evidence, instead of being proven to the satisfaction of the jury without regard to the weight of the evidence. That was what the court did, for in this and other instructions the jury were told that they must base their findings of the facts and their verdict on the evidence. They could not have misunderstood the court, nor could they have been led into the erroneous belief that the proof could be to their satisfaction unless such proof was made and sustained by a clear preponderance of the evidence.

Appellant insists that the verdict is excessive. He uttered the slanderous words, of and concerning the respondent Bessie Childs, in the presence of numerous persons, upon a public street in the city of Spokane. The jury awarded \$750 damages. The trial judge saw the parties and witnesses, heard them testify, and sustained the verdict. Under these circumstances we are unable to conclude that the damages are excessive.

The judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, and FULLERTON, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

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Opinion Per Root, J.

[No. 6977. Decided March 19, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE KING,
Appellant.¹

FALSE PRETENSES—INFORMATION—SUFFICIENCY. An information charging the obtaining of money under false pretenses, by presenting wild cat scalps to a county auditor, when the accused had not killed the wild cats in said county or within a period of three months previous thereto, under Bal. Code, § 7165, is not demurrable and the facts are not inapplicable to the crime charged by reason of Laws of 1905, p. 122, making it a misdemeanor to offer scalps of wild cats that were killed out of the state or prior to the passage of the act; since the information does not show that the wild cats were killed out of the state or prior to the act.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—REASONABLE DOUBT. It is not reversible error, in an instruction as to reasonable doubt, to say that such doubt could only be entertained from the want of evidence to satisfy the jury beyond a reasonable doubt, when, considered in connection with other instructions, it was incapable of prejudicing the accused.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered April 3, 1907, upon a trial and conviction of the crime of obtaining money under false pretenses. Affirmed.

Fairchild & Bruce, for appellant.

Virgil Peringer and George Livesey, for respondent.

Root, J.—Appellant was prosecuted upon an information, the substance of which was as follows:

“The defendant . . . on or about the 5th day of July, 1906, did present and deliver to Will D. Wallace, deputy auditor of Whatcom county . . . thirty wild cat scalps . . . and did, unlawfully . . . pretend that he . . . had killed the wild cats . . . from which the said thirty wild cat scalps had been taken in Whatcom county . . . within three months immediately prior to the said 5th day of

¹Reported in 94 Pac. 663.

July, 1906, whereas . . . said defendant . . . had not killed said wild cats in said Whatcom county and had not killed said wild cats within a period of three months . . . and said defendant did . . . by the color of said false pretenses . . . obtain from Whatcom county . . . the sum of seventy-five dollars in money, as bounty for said scalps."

From a judgment of conviction he appeals to this court.

A demurrer was interposed to the information upon the ground that it did not state a cause of action. The demurrer was overruled. The prosecution was had under Bal. Code, § 7165 (P. C. § 1662). It was contended by appellant that § 4 of chapter 63, Laws 1905, p. 122, covers the offense alleged to have been committed, if any offense is alleged, and that it renders § 7165, *supra*, inapplicable to the particular facts of this case. The substance of said § 4 is as follows:

"Any person . . . offering for the purpose of obtaining said bounty the scalp of any . . . wild cat . . . killed prior to the passage of this act, or that were killed outside of the boundaries of the state of Washington, shall be deemed guilty of a misdemeanor," etc.

Did it affirmatively appear that the wild cats were killed outside of the state of Washington, or prior to the passage of the act in question, there would be no doubt of the soundness of appellant's contention; but such does not appear. They may have been killed in any other county than Whatcom in this state, or at any time since the passage of the act and prior to a date three months preceding that upon which appellant presented the scalps to the county auditor for the bounty. We think the demurrer was properly overruled.

It is urged that the evidence is insufficient to sustain the verdict. We think there was sufficient competent evidence to justify the conclusion reached by the jury. Exceptions were taken to certain questions asked of fur experts with reference to the appearance and condition of the scalps. We have examined these and think no error was committed.

Certain other assignments of error are predicated upon the ruling of the court as to the introduction of testimony, but

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we do not find any reversible error. The trial court gave the jury, among others, an instruction which was, so far as material here, in substance as follows:

"You are instructed further, gentlemen of the jury, that a reasonable doubt for a trial juror . . . But such doubt should only be entertained from the want of evidence to satisfy you beyond a reasonable doubt and should not be merely imaginary, speculative or conjectural."

Appellants complain of the latter portion of this instruction, urging that it told the jury that a reasonable doubt could be entertained *only* from want or lack of evidence, whereas, it might arise from the want of evidence, or from the nature of the evidence itself if it were such as to cause a reasonably prudent man to hesitate—that the instruction was calculated to mislead and confuse the jury. We do not believe that the instruction could have had this effect. Taken together with the other instructions given in the case, we think it was substantially correct and incapable of prejudicing appellant's rights.

Finding no reversible error in the record, the judgment is affirmed.

HADLEY, C. J., CROW, and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 7108. Decided March 19, 1908.]

**NORTH PACIFIC LOAN AND TRUST COMPANY, *Appellant*, v.
CHARLES M. BENNETT *et al.*, *Respondents*.¹**

CONSTITUTIONAL LAW—CLASS LEGISLATION—MORTGAGES—POSSESSION DURING REDEMPTION. Laws 1899, p. 94, §15, providing that mortgaged premises occupied as a homestead by the mortgagors shall remain in their possession during the period of redemption is not unconstitutional as granting special privileges to any class of citizens.

MORTGAGES—FORECLOSURE—POSSESSION DURING REDEMPTION—COVENANTS. Covenants of warranty in a mortgage do not prevent the mortgagors from claiming the right to occupy the homestead during the period of redemption, under Laws 1899, p. 94, §15 providing therefor, which was in force when the mortgage was executed.

SAME—TIME FOR CLAIMING POSSESSION—HOMESTEAD—EXEMPTIONS. Since Laws 1899, p. 94, §15, providing that mortgagors are entitled to the possession of a homestead during the period of redemption from sale, is to be liberally construed as an exemption law, a homestead claim is in time if asserted after sale while the mortgagors are still in possession of the property.

SAME—AMOUNT—SEGREGATION. Objection cannot be made that a homestead occupied by mortgagors during the period of redemption from sale exceeds in value the statutory homestead exemption, where no proceedings were sought to appraise or segregate the exempt portion or amount.

Appeal from an order of the superior court for Spokane county, Poindexter, J., entered June 1, 1907, denying a writ of assistance to obtain possession of mortgaged premises sold under foreclosure and claimed by the mortgagors during the period of redemption under a right of homestead therein. Affirmed.

A. D. McLaren, for appellant.

Clausen & Crane, for respondents.

Root, J.—To secure the payment of two promissory notes, respondents Bennett gave a mortgage upon certain real estate

¹Reported in 94 Pac. 664.

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in Spokane county. Default in payment having been made by mortgagors, appellant foreclosed upon the property in question and, at the sale thereof, became the purchaser. The mortgagors were in possession of the property at the time of the sale, and declined to surrender possession to the purchaser. The latter applied for a writ of assistance. Upon return on an order to show cause, the mortgagors filed an affidavit and declaration of homestead, and claimed the right to remain in possession of the property during the period of redemption, under the provisions of Laws 1899, p. 94, chap. 58, § 15 (Pierce's Code, § 888). Thereupon the trial court denied the petition for a writ of assistance. From this order of denial, the present appeal is prosecuted.

Appellant, in support of its claim for a reversal, urges five contentions, as follows: (1) That the provision of the statute referred to *supra*, reading as follows: "Provided, further, that in case of any homestead occupied for the purpose at the time of sale, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation," is unconstitutional because in violation of the following constitutional provision: "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Const., art. 1, § 12. (2) A mortgage containing covenants of warranty prevents the mortgagor therein from doing any act which would be contrary to his covenant to defend the title. (3) That a homestead cannot be claimed by a judgment debtor after an execution or foreclosure sale of the premises described in his declaration of homestead. (4) That the homestead herein claimed is admittedly of greater value than by law exempted for such purpose. (5) That where a homestead exemption is claimed, only such premises or part thereof as are occupied by the judgment debtor for the purpose of a residence for himself and family and not exceeding \$2,000 in value will be allowed.

We are unable to agree with any of these contentions. The statute in question is in the nature of an exemption law, and is a declaration of the state's public policy relative to premises occupied by a judgment debtor as a homestead. It acts equally and impartially upon all such debtors so situated. This is sufficient to dissipate the charge that it contravenes the constitutional provision invoked. *State ex rel. Luria v. Wagener*, 69 Minn. 206, 72 N. W. 67, 65 Am. St. 565, 38 L. R. A. 677; 6 Am. & Eng. Ency. Law (2d ed.), 80.

As to appellant's second proposition, it is sufficient to answer that the covenants of warranty in the mortgage must be read with this statute which was in force at the time the mortgage was executed.

Appellant's third contention calls for a strict construction of the law, whereas courts have almost universally given a liberal construction to statutes of this character. In view of their benevolent purpose, it is highly appropriate that they should be liberally construed. 15 Am. & Eng. Ency. Law (2d ed.), 523. Inasmuch as the judgment debtors asserted their homestead claim while yet in the possession of the premises, we think it was within due time. *Anderson v. Stadlmann*, 17 Wash. 483, 49 Pac. 1070; *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358.

As to the fourth and fifth contentions, it may be observed that no proceedings to appraise or segregate the portion or amount exempt have been attempted, and it is doubtful if such are contemplated under the statute in a case of this kind. It is unnecessary, however, to pass upon the latter question.

Finding no error in the order of the trial court, the same is hereby affirmed.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

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Opinion Per Root, J.

[No. 7160. Decided March 19, 1908.]

LORENZ FLORIN, Appellant, v. JACOB FLORIN, Respondent.¹

CANCELLATION OF INSTRUMENTS—UNDUE INFLUENCE AND INCOMPETENCY—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain findings and a decree refusing to cancel a deed from a father to a son on the ground of undue influence and incompetency, where it appears that the grantor, who was over eighty years of age, had trouble with his wife and stepdaughter and feared they would obtain the property conveyed, that he had given considerable to another son, and still retained considerable property, that he had stated that he intended to deed the property to his son and afterwards expressed satisfaction therewith, and the charges as to misrepresentation, undue influence and incompetency were overcome by the evidence.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered September 21, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for the cancellation of a deed. Affirmed.

Merritt, Hibschman, Oswald & Merritt, for appellant.

Warren W. Tolman and John W. Murdoch, for respondent.

Root, J.—Plaintiff brought this action to set aside a deed conveying certain real estate to the defendant, who is one of his sons. From a judgment in favor of defendant, the plaintiff appeals.

The appellant is eighty-two years old. He came to Washington in 1882, bringing with him his wife, two sons John and Dave, a stepdaughter Mary Helstead, and his brother-in-law. His son George is the eldest, and lives in Wisconsin or Minnesota. Respondent, who is commonly called and known as "Jake," is thirty-five years old, having been thirteen when appellant came to Washington. The mother of Dave, John, and Jake died when Jake was nine months old, and Jake lived

¹Reported in 94 Pac. 658.

thereafter, until he was married in 1907, with Jake Wald. At the time appellant came west, his son John went to respondent and asked him to come west with them, but he refused to come. The Walds said they could not spare him; that appellant could not get him. Appellant came first to Cheney, and then went to Medical Lake. He had about \$400, with which he bought a house and two lots. He continued to reside at Medical Lake during that summer, when he traded his house and lots for a relinquishment of a homestead right. That homestead is being occupied by the stepmother and her daughter Mary, to whom it has been conveyed. The two sons Dave and John worked away from home, earned the living for the family, and Dave took charge of the business affairs. They put about \$1,500 improvements on the homestead. Dave died in 1904, seized of the property in suit, of the value of \$20,000. He left appellant as his sole heir.

About the time of Dave's death, appellant and his wife and stepdaughter began having trouble about his property. The fear that his wife and stepdaughter would get the property which he acquired as heir of his son Dave, caused him much worry. Jake had never been in Washington; nor had he aided Dave and John in caring for appellant. Soon after Dave's death he came to Washington. After remaining here about fourteen months, he returned to Wisconsin, in February, 1906, taking his father with him. Appellant talked to Jake on the way going to Wisconsin and, in Jake's language, "lots of times" while there about the fear that the stepmother and stepdaughter would get a share of this property. Jake wrote a letter for his father to the bank in Davenport, and procured the deeds containing a description of the real estate. Appellant claims that, while appellant and respondent were driving alone, respondent suggested to his father that he had better deed the land to him (Jake) and save trouble, and that he promised to keep the deed and not record it as long as appellant lived; and after appellant's death he would divide the land with his brother; and that if he married a satisfactory

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wife, he would return to Washington with his father. Respondent denies that he first suggested making the deed, but claims that it was suggested by his father. He also denies that he promised not to record the deed. The deed was executed, and a few days thereafter defendant sent it to Davenport, the county seat of the county in which the real estate is situated, to be recorded. Plaintiff scolded his son for recording the deed when he ascertained that he had done so. No money was paid by respondent in consideration of the conveyance.

It is contended by appellant that the respondent induced him to make this conveyance by means of undue influence and importunities, and by taking advantage of his old age and infirmities and of the confidential relations that existed between them as father and son, and by working upon the fears that appellant had of difficulty with his wife and daughter-in-law. It is also urged that respondent failed to carry out his part of the agreement to the effect that he should come to the state of Washington to live. It does not appear that the respondent made any misrepresentations to the appellant, nor does it appear that his relations with the father were as intimate as were those of one of his other sons, who appears to have been his father's business adviser. Some time prior to the conveyance the appellant directed respondent to write to Washington for the deeds to the property. Respondent testified that his father spoke to him on three previous occasions about the matter, and told him he intended to make this deed. Appellant denies that the matter was ever discussed until the day before the deed was made. Several witnesses testified to statements of the appellant to the effect that he was going to give this land to respondent. One of the other sons of appellant appears to have been mentally unsound and incapable of holding property or transacting business, and the only other son had received considerable consideration from the father in the way of loans, and the appellant still retained considerable property in his own name and right. There was evidence to

the effect that, after the deed was executed and recorded, appellant expressed to different persons his satisfaction with having conveyed the property to respondent. About a year after the deed was made, respondent was married. Appellant contemplated securing a divorce from his wife, and consulted an attorney with reference thereto. Some of the evidence goes to show that he thought a divorce necessary in order to clear the title to the property which he had conveyed to respondent. But upon being advised that this was not necessary, he directed his attorney not to proceed with the divorce action.

It is urged that the appellant, by reason of his old age and infirmities, was mentally incompetent to execute this deed. In support of this contention, certain witnesses on the part of appellant gave evidence as to his weakness and infirmities; and against the contention, numerous others, on the part of respondent, gave evidence touching such matters. The appellant was himself a witness in the case. The trial court reached the conclusion that the appellant was competent to execute the deed, and that there was nothing in the transaction sufficient to justify setting the deed aside. We think appellant's incompetency was not established. Taking the evidence as a whole, we think all the charges of undue influence, importunity, misrepresentation, and misuse of confidential and fiduciary relationship on the part of respondent are overcome, and that the evidence does not present facts that would justify the court in setting aside the deed.

The judgment of the superior court is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

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Opinion Per Root, J.

[No. 7172. Decided March 19, 1908.]

THE STATE OF WASHINGTON, *on the Relation of F. M. Guye, Respondent, v. THE CITY OF SEATTLE et al., Appellants.*¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES—RIGHT TO OFFSET AGAINST ASSESSMENT—WAIVER—EMINENT DOMAIN. The right of a property owner to offset compensation for lands taken, in condemnation proceedings by a city for a local improvement, against an assessment for benefits to his other lands not taken, is not waived by taking warrants for such assessments which would presumably be payable in the order of their issuance, although the ordinance giving the right of a setoff provided that persons wishing to offset an award of compensation shall receipt therefor upon the execution docket and make satisfaction of the amount sought to be offset, etc.; since the failure to observe technicalities should not defeat the right of offset where no injury or expense resulted in taking out the warrants.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 16, 1907, in favor of the plaintiff, upon overruling a demurrer to the petition, granting a writ of mandamus. Affirmed.

Scott Calhoun and Howard A. Hanson, for appellants.

William A. Greene and Higgins, Hall & Halverstadt, for respondent.

Root, J.—This is an action for a writ of mandamus to compel the city treasurer to permit relator to offset damages against an assessment for local improvements. Respondent, F. M. Guye, was, on December 26, 1906, the owner of a certain lot on Third avenue in the city of Seattle, a portion of which lot was taken in a proceeding instituted by said city on said date for the widening of Third avenue in said city, pursuant to ordinance No. 14345 of said city, and ever since said date respondent was, and now is, the owner of that part

¹Reported in 94 Pac. 656.

of said lot not taken in said proceeding. In that proceeding Guye was awarded \$5,812.50 for that part of the lot taken, and judgment was entered accordingly, with costs taxed at \$15.60. Thereafter the eminent domain commission of the city of Seattle, pursuant to said ordinance No. 14345 and the statute, prepared and filed an assessment roll, in which it did assess property specially benefited to pay for property taken and damaged in said condemnation proceeding. The portion of Guye's lot not taken was assessed in the sum of \$7,045, and this assessment was confirmed by the court. This roll was then duly certified to the city treasurer for the collection of said assessments. After the entry of the judgment in the condemnation proceeding, Guye presented to the city comptroller of said city a duly certified transcript of his said judgment and received two warrants therefor, one numbered 251 for \$5,828.10, being the amount of his award and costs, and one numbered 252 in the sum of \$29.06, being accrued interest on the judgment. These warrants were drawn upon the special condemnation fund created to pay the awards and costs in said condemnation proceedings, but were no obligation of the city. Guye, at the time of the commencement of this action, owed the said fund \$7,045 on account of the assessment against that portion of his said lot not taken, and the fund owed Guye \$5,857.16 as evidenced by his said warrants Nos. 251 and 252.

After said assessment roll was so certified to the appellant Russell for collection, and before the roll became delinquent, Guye sought to offset the two accounts by tendering to the appellant Russell a duly certified transcript of his said judgment, showing due satisfaction thereof, and at the same time tendering to the appellant Russell said warrants Nos. 251 and 252 for cancellation, together with the sum of \$1,187.84 in cash (said sum being the balance of said assessment remaining after offsetting the amount of his said award and costs) seeking thus to bring himself within the provisions of ordinance No. 10725 of the city of Seattle, which is set out in full in the

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application for the writ. The appellant Russell refused said tender, on the ground and for the reason that there were then other outstanding and unpaid warrants drawn on the same fund as said warrants Nos. 251 and 252, which outstanding and unpaid warrants were prior in point of number and date of issue to warrants Nos. 251 and 252, and that there was no money in said fund to pay any of said prior warrants. This action was thereupon commenced. The foregoing facts, together with the ordinance, were set forth in the petition for the writ. Appellants demurred to the petition, on the ground that it did not state facts sufficient to warrant the issuance of a writ. The demurrer was overruled. The appellants having announced that they elected to stand upon their demurrer and having refused to plead further, the court heard the application and entered a decree directing the issuance of the writ as prayed. From this judgment and decree the present appeal is prosecuted.

The material sections of the ordinance referred to are as follows:

“Section 1. Whenever, in condemnation proceedings prosecuted by the city of Seattle, compensation or damages, or both, are awarded to the owners thereof, and other persons interested in any real property taken or damaged, and an assessment upon property benefited is made to pay the whole or any part of the compensation or damages, or both, awarded in such proceeding, and any person or persons to whom such compensation or damages or both is made, also owns real property which is assessed in the same proceeding to pay the compensation and damages awarded in said proceeding, such person or persons may offset *pro tanto*, the amount of the compensation or damages, or both, awarded to such person or persons, against the assessment levied upon real property owned by such person or persons, in the manner herein provided.

“Section 2. Any person or persons wishing to offset an award of compensation or damages, or both, against any assessment, as provided in section one of this ordinance, shall receipt upon the execution docket of the court in which such award is made, and make satisfaction, on said execution docket, of the amount so sought to be made an offset; and

shall procure from the clerk of said court and present to the city treasurer a certificate under the seal of the court specifying the amount of which satisfaction has been made on the execution docket, the date of such satisfaction, the number and a brief title of the proceeding, including the number of the ordinance under which said proceeding was prosecuted.

"Section 3. The city treasurer, upon receipt by him of the certificate provided for in section two of this ordinance, shall be and he is hereby authorized and directed to cancel such assessment upon the assessment roll, to the amount specified in said certificate, making suitable notation thereof upon the assessment roll."

It is the contention of appellants that the respondent, by taking the warrants, waived his right to offset his allowance for damages against the assessment made upon his property, and that the city treasurer could not cancel the two warrants and permit the offset when requested so to do by appellants, as such transaction would amount to the paying of said warrants out of their order and in advance of other warrants theretofore issued against the same fund. We do not believe this position is tenable. These warrants are not regular city warrants. They are drawn solely against the fund collected for the payment of the damages allowed in the prosecution of this particular improvement. The purpose of the statute requiring that warrants upon the general fund shall be paid in the order of their issue is to guarantee the payment of a city's indebtedness in the order of the incurring thereof. This is just and fair to its creditors. But in an instance like the one before us, all of the people whose property is taken or injured by this improvement stand as a matter of justice in the same position, and it could hardly be said that any one had, or was entitled to, preference over any other person to whom was due compensation by reason of such taking or injuring of property for the improvement in question.

Whatever might be said as to the order of precedence in the payment of warrants drawn upon this special fund, we do not think the contention of appellants can be sustained

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here, for the reason that we do not think the taking of the warrants changed the form of the indebtedness to an extent that would forbid the respondent from having the benefit of an offset. What was the purpose of this ordinance? It was clearly to allow property owners the privilege of offsetting against their assessment the amount that was due them by reason of property taken or injured in the making of the identical improvement for which the assessment was levied. The justice of such an ordinance is readily apparent, and it does not appear how the city can be injured by permitting the offset as requested by respondent. The ordinance does not say that the property owners' *judgment* may be offset against the assessment, but it says that "the amount of the compensation or damages, or both," may be offset. If the respondent before taking the warrants had presented the necessary certificate and requested an offset, it would have been permitted. This, in effect, would have been a payment out of the fund against which the prior warrants were drawn, which it is now claimed have precedence over those held by respondent. It will, therefore, be seen that the position of these prior warrant holders and the city would have been the same as if the offset had been allowed at the time respondent requested it. It appears to us that the entire matter turns upon a technicality, and one which should not be permitted to defeat substantial justice. Why respondent took out these warrants instead of taking his certificate in the exact manner pointed out by the ordinance we do not know. But it was clearly the intention of the city in passing the ordinance to give such property owners the right to offset the amount due them against their assessment, and we do not think that right and privilege should be defeated by reason of what was done by respondent in this case in the matter of taking the warrants. Neither the city nor any one else can be injured by permitting the offset. It does not appear that the city or city treasurer was put to any substantial trouble or expense by reason of the warrants having been issued, or that their cancellation would occasion

such. Did it appear that any extra expense was so incurred, we do not think the respondent would be entitled to have the offset without reimbursing the city for the expense it had been put to by reason of his unnecessarily taking out such warrants and having them canceled.

We think the spirit of the ordinance will be observed by permitting this offset, and the judgment of the superior court is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

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[No. 7185. Decided March 10, 1908.]

SPIRIT VALLEY LUMBER COMPANY, *Respondent*, v. A. H.
AVERILL MACHINERY COMPANY, *Appellant*.¹

SALES — CONTRACTS — SPECIAL WARRANTY — CONSTRUCTION — REMEDIES OF VENDEE. Upon the sale and return of a road locomotive under a special warranty providing that if the engine is returned after a ninety-day test, the vendee shall pay the vendor \$1.20 per thousand for all lumber hauled during the test, "less the actual engine expense paid and less the freight money paid by the purchasers," the accounts are balanced where such expense exceeds the toll for hauling lumber; and a judgment in favor of the vendee for the excess of expense and freight paid is unwarranted.

SAME. The purchaser of a road engine is not entitled to recover damages for breach of an implied warranty, where the machine was sold under written general and special warranties, which provided for a ninety-day test and the return of the machine within that time, if not satisfactory, with cancellation of notes for the purchase price and no further claim to be made upon the vendor; the special warranty further providing for certain payments for use of the engine, less sums paid out for engine expense and freight.

SAME—REMEDIES OF VENDOR. Upon the return of an engine for failure to comply with a special warranty providing for a test, the vendor is not entitled to recover for goods and wares placed upon the engine and returned with it at the end of the test.

¹Reported in 94 Pac. 650.

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Opinion Per Root, J.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered July 16, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Danson & Williams (Fred H. Moore and A. C. Shaw, of counsel), for appellant.

O. C. Moore, for respondent.

ROOT, J.—This action was brought by respondent to cancel certain promissory notes given by it in payment of a road locomotive, and to recover certain damages alleged to be due it from appellant under the terms of the contract of sale of said locomotive. From a judgment and decree in favor of plaintiff, the defendant appeals.

On March 12, 1906, respondent, Spirit Valley Lumber Company, gave an order to appellant, A. H. Averill Machinery Company, for the furnishing of one 8x14x12 50 horse power Russell road locomotive, for the agreed price of \$4,800. This order was delivered to appellant's local manager at Spokane, Mr. A. Mitchell, who forwarded same to appellant's principal office at Portland, Oregon, with the recommendation that it be accepted. Thereafter appellant did accept the order, with certain changes, and furnished the machinery pursuant thereto. This order was in part on the ordinary printed blank used by appellant in taking such orders, but the remainder, and the portion out of which this litigation arises, was prepared in Spokane under the supervision of the attorney for respondent, Spirit Valley Lumber Company. This addition to the printed form of contract, and which was prepared by respondent, and out of which the questions involved in this action arise, is as follows:

"The engine mentioned in the attached contract is guaranteed to haul 25,000 feet of dry pine or fir lumber each trip from the mill to Newport, Wash., a distance of about seven miles, over ordinarily good roads, with medium grades, made

especially for engine work. Weather conditions permitting two round trips are to be made each day of 24 hours from the mill to Newport. It is agreed that the purchasers shall furnish a capable crew to load lumber at the mill and to unload the same at Newport, and that the work shall be done with dispatch so that the engine may be enabled to make the trip in the required time. The purchasers further agree that delays on account of trouble with wagon train, or any other cause outside of the engine itself, shall not be chargeable to the engine under this special warranty. It is agreed that the average cost of repairs for keeping the engine in good working order shall not exceed \$100 per month. The purchasers agree to furnish a train crew, and further agree to furnish at their expense all fuel and water as it may be required. This special warranty is to extend over a period of 90 days from date of the delivery of the engine at Newport, Wash., after which period the regular printed warranty only is to apply. If the engine fails to fulfill the special warranty it is to be returned to the A. H. Averill Machinery Company at Newport, Wash., as soon as failure is discovered and within 90 days from the date of delivery of the engine. In the event of the engine being returned under the special warranty, it is agreed that the A. H. Averill Machinery Company is to receive from the purchasers the sum of \$1.20 per 1000 feet for all lumber hauled from the mill to Newport during the test, less the actual engine expense paid, and less the freight money paid by the purchasers, and all notes and mortgages given in settlement for engine shall be returned to the purchasers, who agree to make no further claim of any kind against the A. H. Averill Machinery Company under the warranty given. The purchaser is hereby given the privilege of hauling logs with said engine and using same in its general sawmill business, and said use shall not vitiate any of the terms of this agreement."

The machinery was delivered to respondent and used by it for the ninety days provided by the contract, and was then returned. After the return of this machinery, respondent commenced this action to recover the sum of \$705.25 freight money paid, and \$2,389.41 which it was alleged "plaintiffs expended for material used in repairs, labor, fuel and water, all constituting actual and necessary operating expenses."

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Demand was further made for the return of certain notes which were given by respondent as evidence of the purchase price. Judgment was demanded in the sum of \$3,094.66, with interest, and for the return of said notes. Appellant in its answer admitted the contract, which was attached as an exhibit to the complaint, admitted that respondent had paid the sum of \$705.25 freight money, admitted the possession of the notes given as part of the purchase price of the engine, and alleged a willingness to return such notes to respondent. The remainder of the material allegations of the complaint were denied. An affirmative defense and counterclaim was also alleged, by which appellant claimed a recovery of \$322.02 and interest for goods, wares and merchandise furnished. A judgment was entered in favor of respondent, in the sum of \$1,583.91, and interest and costs, and the decree directed the surrender and cancellation of the appellant's promissory notes.

The principal controversy arises over the construction of the portion of the contract hereinbefore set forth. Appellant contends that the respondent was entitled to offset freight money and actual engine expenses only to the extent of the amount which should be found due at the end of the ninety days for hauling the lumber, whereas respondent contends, and the lower court held, that respondent was entitled to collect all of the amount it might pay as freight money and actual engine expense, less the amount earned by the appellant in hauling lumber.

It seems to us that the terms of the contract clearly sustain the contention of appellant. There is no agreement to pay respondent anything. There is a positive agreement to pay the appellant \$1.20 per thousand feet for all lumber hauled, "less the actual engine expense paid, and less the freight money paid by the purchasers." These terms were to apply in the event of the engine being returned within the ninety days, which was done. The amount due for hauling the lumber was \$1,188.27. Against this, respondent was entitled to

charge \$705.25 freight money paid, and such actual engine expenses as it was required to pay. After deducting the freight money, there would be a balance of \$483.02 of the amount due for hauling lumber. There is considerable conflict as to the items which the respondent claims to have paid as engine expenses, but we think it satisfactorily appears that the amount which it rightfully paid as such expenses was sufficient, together with the freight money, to equal the total sum due appellant for hauling lumber. These accounts must, therefore, be treated as balanced.

Respondent contends that it was entitled to recover on a breach of warranty implied as a matter of law, in addition to any allowance to it by reason of the portion of the contract quoted. We think other provisions of the contract defeat this contention. Some of them are as follows:

"The above mentioned engine sold under regular warranty as printed on contract blank and in addition thereto under the special warranty hereto attached and made a part of this contract except as modified by the hereto attached typewritten provision

"If said machinery, or any part thereof, shall fail to fill this warranty, written notice shall be given to the A. H. Averill Machinery Co., Portland, Oregon, and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity and friendly assistance given to reach the machinery and remedy any defects. If the defective machinery cannot then be made to fill the warranty, it shall be returned by the purchaser to the place where received, and another furnished on the same terms of warranty, or money and notes to the amount represented by purchase price of the defective machinery, shall be returned and no further claim be made on the Russell & Company, or the A. H. Averill Machinery Co. Continued possession or use of the machinery for six (6) days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the purchaser, who agrees thereafter to make no further claim on the Russell & Company, or the A. H. Averill Machinery Co. under warranty. Last provision not in force during period covered by special warranty."

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Statement of Case.

It seems to us that, under the pleadings as we find them, any allowance to respondent must be by virtue of the special provision which the parties attached to the ordinary contract form.

Appellant claims \$322.02 as due for goods, wares, and merchandise sold respondent in addition to the engine. It appears, however, that all of these goods were placed upon the engine, and surrendered with it to the appellant at the end of the ninety days, and under the circumstances of the case are not chargeable against respondent.

The judgment of the honorable superior court is reversed, with directions to enter a decree directing the surrender and cancellation of the promissory notes, but allowing no money recovery to either of the parties; the costs in this court to appellant.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7124. Decided March 10, 1908.]

J. L. MARBOURG, Respondent, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, Appellant.¹

CARRIERS—PASSENGERS — SETTING DOWN PASSENGERS — CONTRIBUTORY NEGLIGENCE. Where a conductor on a street car, in response to a passenger's request to stop at a certain street, closed one gate, gave the signal to stop, and opened another gate, and the car slowed up and came to the point of stopping, the passenger is not negligent in attempting to alight while the car is in motion, although there was no platform on the side of the open gate; and the company is negligent in suddenly starting up the car before the passenger is safely off.

APPEAL—REVIEW. Upon objection to a complaint in the supreme court, the same will be deemed amended to conform to the facts proven.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 8, 1907, upon the verdict

¹Reported in 94 Pac. 649.

of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in alighting from a street car. Affirmed.

Sachs & Hale, for appellant.

James M. Epler, for respondent.

MOUNT, J.—Action for personal injuries. Plaintiff recovered a judgment for \$250. Defendant appeals.

The facts are as follows: The respondent on April 26, 1906, was a passenger on one of the appellant's cars within the city limits of Seattle. When respondent boarded the car, he asked the conductor in charge if the car would stop at Hill street, and was informed that it would. When the car approached within about a block of Hill street, the respondent again asked the conductor to let him off at Hill street, and the conductor responded, "All right." The conductor then closed the gate of the car on the side toward the station or a platform which was used for that purpose, and left the gate of the car open on the opposite side of the car where there was no platform. He gave the motorman the signal to stop. Respondent thereupon, with a grip in his hand, went to the rear of the car, through the open gate, and took a position on the step, intending to alight at the station when the car should stop. The car slowed down, and respondent waited until he thought it was about to stop and then stepped off the car. Just at that moment the car started up at full speed, and respondent was thrown to the ground and injured.

It is argued by the appellant that these facts show that there was no negligence of the appellant, and that the respondent was himself negligent by reason of attempting to alight from a moving car. 6 Cyc. 646, and *Blakney v. Seattle Elec. Co.*, 28 Wash. 607, 68 Pac. 1037, are cited to support this argument. In that case we said:

"It need not, of course, be argued that a woman of mature years and discretion cannot recover from a street car company for injuries received by her while attempting of her

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own volition to alight from one of its cars while the same is in motion; nor need it be argued that it is negligence *per se* to increase the speed of a car, nor that it is not negligence to do so when a passenger is in the act of alighting therefrom unless the car company knows, or could, by the exercise of reasonable diligence, have known, of that circumstance; and this latter was neither within the issues nor the proofs of this case."

This case does not support the position of the appellant here, because here the company did know, or at least should have known, that the respondent was in the act of alighting from the car; and instead of permitting the car to come to a stop as the respondent undoubtedly had a right to suppose would be done, the car was suddenly started forward while he was in the act of alighting. The act of the conductor in closing one gate, giving the signal to stop, and leaving the other gate open, was an implied invitation to the respondent to alight on that side of the car, even if the platform or station was on the opposite side. The respondent certainly had a right to suppose under the circumstances that the car would stop at a particular point, and to act upon that assumption. If the car had not slowed down to the point of stopping, or if respondent had not been led to believe that the car would stop, of course he would have been negligent in attempting to alight therefrom while it was in motion. But here the car was at the point of stopping and at the place where respondent had been told it would stop. We think, under these conditions, he cannot be said to have been negligent as a matter of law. The motorman and conductor were certainly negligent in starting the car again before the respondent was safely off. Appellant also argues that the complaint was insufficient, but the complaint will be treated as amended here to conform to the facts, which we think are sufficient.

The judgment must therefore be affirmed.

HADLEY, C. J., Root, Crow, and FULLERTON, JJ., concur.

[No. 7121. Decided March 23, 1908.]

CARRIE C. MATHEWS, *Respondent*, v. WILLIAM WAGNER,
*Appellant.*¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—ENFORCEMENT—LIMITATION OF ACTIONS. Under Laws 1895, p. 270, the statute of limitations does not run against an action to enforce a lien for a special improvement assessment until ten years after the last installment of the assessment falls due.

SAME—LIMITATION OF ACTIONS—STATUTES—REPEAL BY IMPLICATION. Laws 1903, p. 26, amending the general statutes of limitations by adding the proviso exempting actions brought for the benefit of municipalities or the state, does not impliedly repeal the special act of 1895, p. 270, providing a limitation for the bringing of actions to enforce liens for local improvement assessments.

SAME—DELINQUENT ASSESSMENTS—RIGHTS OF HOLDER—SUBROGATION. The holder of delinquency certificates issued by a city for overdue installments on local improvement assessments is subrogated to the rights of the city as to liens therefor upon the land, and may assert the liens against an action to quiet title.

Appeal from a judgment of the superior court for King county, Griffin, J., entered August 1, 1907, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to quiet title. Reversed.

Todd, Wilson & Thorgrimson, for appellant.

Smith & Cole and *F. D. Chamberlain*, for respondent.

MOUNT, J.—The respondent brought this action to remove a cloud from her title to a certain lot in Seattle. The appellant demurred to the amended complaint on the grounds that there was a defect of parties defendant, and that the complaint did not state facts sufficient to constitute a cause of action. The lower court overruled this demurrer, and the defendant stood thereon, and a judgment was entered as prayed for. This appeal is prosecuted from that judgment.

¹Reported in 94 Pac. 759.

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The appellant contends here that the court erred upon both grounds. The facts stated in the amended complaint are substantially as follows: In 1894 the city of Seattle duly levied a special assessment in the sum of \$98 against respondent's lot, for the improvement of Harrison street, as provided for by a city ordinance creating local improvement district No. 80. This assessment was made payable in ten annual installments, on the 7th day of November in each year, beginning with the year 1895. In 1899 the city levied another special assessment in the sum of \$115.27, against the same lot, to pay for the improvement of Second avenue north, as provided for by an ordinance creating local improvement district No. 193. This assessment was payable in one sum on July 21, 1899. None of these assessments were paid when they became due, and the city treasurer thereafter certified the same to the county treasurer for collection. The payments for the years 1895-6-7-8-9, on the assessment for district No. 80, and the whole of the \$115.27 assessment being delinquent, the appellant, William Wagner, on December 7, 1900, paid the whole of the amount due, with interest, amounting to \$283.86, and the county treasurer issued to the appellant a certificate of delinquency therefor. Thereafter the installment for the year 1900 became due and, not having been paid, was certified by the city treasurer to the county treasurer for collection, and in the year 1901 this delinquency was paid by appellant under his certificate. The same course was pursued as to the installment due in 1901. Appellant also paid the general taxes for the years 1902 and 1903, and is now the owner and holder of the certificate of delinquency above referred to, upon which he has paid the sum of \$356. The respondent thereafter paid the remaining installments due on the assessments, and the general taxes levied after the year 1903. Prior to the bringing of this action, the respondent tendered to the county treasurer of King county the sum of \$71.05, in full payment and redemption of assessment installment due in 1901, and the general taxes for the years

1902-3, paid by appellant under his certificate of delinquency as above stated. The county treasurer refused to accept this tender and thereafter, on April 23, 1906, this action was begun and the amount of this tender was paid into court for the appellant. The amended complaint then alleges that the two-year statute of limitations has run against the enforcement of these liens created by the assessments, and against the payment made by the appellant, except those for which tender was made, and that such liens cannot, therefore, be enforced against the respondent's lot, and are a cloud upon her title. The theory of the complaint is that the two-year statute of limitations has run against the appellant's claim. If this theory is not correct, it follows that the action cannot be maintained.

This court in *Spokane v. Stevens*, 12 Wash. 667, 42 Pac. 123, held that the two-year statute of limitations applied to actions by municipal corporations for the foreclosure of liens created by an assessment for street improvement purposes, where no different limitation had been prescribed for such actions. That case was followed in subsequent cases. See *Seattle v. De Wolfe*, 17 Wash. 349, 49 Pac. 553. But the act of 1895, Laws of that year, page 270, was passed especially to extend the time within which actions might be brought to enforce special assessments. It provides that actions to enforce such liens shall be commenced "within ten years after the last installment of any such special assessment shall have become delinquent or due when said special assessment is payable in installments." This statute is clear and explicit and was passed while *Spokane v. Stevens* was pending in this court, and was evidently passed in anticipation of the decisions which were made as above stated. It is a special statute prescribing the time within which actions may be brought for the collection of special assessments for local improvements. Respondent seeks to avoid this statute by arguing that it was repealed by the act of 1903, Laws 1903, p. 26.

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This last-named act is an amendment to Bal. Code, § 4807 (P. C. § 291). It is as follows:

“. . . Section 35 (Bal. Code, § 4807). The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or quasi municipality of the state, in the same manner as to actions brought by private parties: *Provided*, That there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: *And further provided*, That no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed.” Laws 1903, p. 26.

This is a general statute. It does not purport to repeal any other statute. It simply amends the general statute by adding the two provisos contained therein, and it has no reference to the act of 1895, or any other special statute.

“Repeals by implication are not favored. A statute will not be construed as repealing prior acts, in the absence of express words to that effect, unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand, and to comprise in itself the sole and complete system of legislation on that subject.” *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107.

See, also, *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91.

The two acts are not in conflict, and it is clear that the act of 1903 was not intended to modify the act of 1895 in any respect. It does not repeal the former statute. The statute of limitations, therefore, has not run against the lien for street improvements in this case, and will not do so until ten years after the last installment of the assessment becomes due.

It is claimed by respondent that the appellant cannot avail himself of the rights of the city, but under the rules in *Pack-*

wood v. Briggs, 25 Wash. 530, 65 Pac. 846, and *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751, this contention is without avail, because the appellant is subrogated to the rights of the city, and the appellant cannot maintain this action until the lien is discharged. With this view of the case we need not discuss the other questions presented. For the reason that the assessments set out in the amended complaint constitute a valid lien upon the respondent's lot, she cannot maintain this action until the lien is discharged.

The judgment is therefore reversed, and the cause remanded with direction to dismiss the action.

HADLEY, C. J., Root, FULLERTON, and Crow, JJ., concur.

[No. 6788. Decided March 23, 1908.]

BARTLETT ESTATE COMPANY, *Appellant*, v. FAIRHAVEN LAND COMPANY, *Respondent*.¹

MORTGAGES—OPTION TO DECLARE DEBT DUE—RIGHTS OF ASSIGNEE. An assignee of a mortgage giving to the mortgagor the option to declare the whole sum due upon default in the payment of interest or principal has the right to exercise the option, although the mortgage omits words of inheritance or of succession.

SAME—PARTIAL RELEASE—CONSTRUCTION—MATURITY OF DEBT BY EXERCISE OF OPTIONS. A release agreement providing that portions of the mortgaged premises shall be released upon the making of partial payments "prior to maturity," requires that such payments be made before the mortgagee has elected to declare the whole debt due for default in the payment of interest or installments of the principal; and evidence of sales, since the commencement of the action, of portions of the premises sufficient to pay the amount of the debt in arrears, is inadmissible.

SAME—ATTORNEY'S FEES. Upon the mortgagee's electing to declare the whole debt due after default in the payment of interest or installments, there should be allowed an attorney's fee based upon a recovery of the entire debt.

¹Reported in 94 Pac. 900.

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EVIDENCE—TO VARY WRITING—ADMISSIBILITY. The plain and unambiguous terms of a mortgage and release agreement cannot be varied or added to by extrinsic evidence to aid in its construction.

Cross-appeals from a judgment of the superior court for Whatcom county, Neterer, J., entered January 11, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage upon real estate. Reversed.

Newman & Howard, for appellant.

Black, Kindall & Kenyon and *Dorr & Hadley*, for respondent.

FULLERTON, J.—In this action the Bartlett Estate Company, plaintiff below, sought to recover from the defendant, Fairhaven Land Company, upon six promissory notes executed by the last-named company, payable to one Richard B. Ayer, as executor of the last will and testament of Erastus Bartlett, deceased, and to foreclose a mortgage given to secure the notes. The notes and mortgage by assignment had become the property of the plaintiff. The notes were executed on September 13, 1902, the first being for \$27,000, payable on or before July 13, 1903, the second, third, fourth, and fifth being for \$20,000 each, payable consecutively on July 13 of the years 1904, 1905, 1906, and 1907, the sixth being for \$53,000, payable on July 13, 1908; each of said notes bore interest at the rate of five per centum per annum, payable, with the exception of the first, semi-annually. The mortgage was conditioned to secure the payments of the several notes according to their tenor and effect. It also contained a condition to the effect that if default should be made in the payment of the principal sum of any one of the notes or the interest due thereon at the time the same should become due, or if default should be made in the payment of the taxes assessed upon the mortgaged property within thirty days after the same became delinquent, then the aggregate sum of

the principal and interest owing upon the notes should become immediately due and payable at the option of the "party of the second part [the mortgagee] without notice to the" mortgagor.

At the time of the execution of the notes and mortgage and as a part of the same transaction, the mortgagee executed and delivered to the mortgagor an instrument, called by the parties a partial release agreement, by the terms of which the mortgagor agreed to release from the operation of the mortgage certain described tracts of land on the payment of certain fixed sums as set forth in a schedule attached to the agreement; the time when such partial payments could be made, and the effect of the same, is set forth in the agreement in the following language:

"And it is further agreed that any one or more such partial payments may be made at any time prior to maturity, and that all payments under this agreement may be made to the said Richard B. Ayer, as executor of the last will and testament of the said Erastus Bartlett, deceased, by paying the money therefor in cash to the said Richard B. Ayer, at Fairhaven, Whatcom county, Washington, or to such other person as the said Richard B. Ayer, as executor, may designate by written notice to the said Bellingham Bay Land Company, and said payments, when so made, shall be forthwith endorsed upon the first note due described in the mortgage and credit shall be immediately given to the Fairhaven Land Company of such payment upon the first note due from it to said Ayer.

"It is further understood and agreed that nothing herein contained shall affect or vary the terms and condition of the original mortgage contract, or in any manner impair the lien thereby created on any of the property in said mortgage, otherwise than in this agreement contained. In the event of a foreclosure nothing herein contained shall be construed to prevent the entry of a decree adjudging the entire amount due or to become due upon said notes described in the said mortgage as a valid first lien upon all of the property described in said mortgage not theretofore released."

The action was brought on July 23d, 1904. At that time there had become due by the terms of the mortgage, in prin-

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cipal and interest and unpaid taxes, over and above payments, some \$31,000, and the holder of the mortgage sought to exercise the option therein given by declaring the whole sum of principal and interest due and payable, and brought the action to foreclose the mortgage for the entire amount.

The complaint was in the usual form. It set forth the notes and mortgage at length, stated the amount paid and the amount delinquent thereon, averred a breach of the condition of the mortgage, the holders election to declare the entire sum of principal and interest due, and prayed a decree subjecting the mortgage property to a sale in satisfaction of the amount due. The answer was not filed until nearly a year after the commencement of the action. It was long and complicated. After denying certain allegations of the complaint it set forth three several affirmative defenses, followed by three several counterclaims, all growing out of matters arising subsequent to the commencement of the action of foreclosure. These defenses and counterclaims were based on what the defendant conceived to be breaches of the conditions of the terms of the mortgage and the terms of the partial release agreement. It was also contended that, since the right of election given to the mortgagee to declare the entire mortgage debt due and payable on failure to pay the installments of principal and interest and the taxes as the same became due and delinquent did not in terms extend to an assignee of the mortgage, the right was personal to the original mortgagee and did not pass by assignment to the plaintiffs, and, as a necessary deduction from that principle, it followed that the mortgagor had the right to make partial payments on the mortgage and receive partial releases of the mortgaged property up to the time of the maturity of the last installment of the principal. Acting pursuant to this contention, the defendant made tenders of payment in accordance with the terms of the release agreement, and demanded releases of property in consideration thereof. These tenders the plaintiff refused to accept, and such refusal constitutes the breaches

which give rise to the affirmative defenses and counterclaims. The amount of one of such tenders; namely, a tender of \$104.48, for the release of a strip of land described in the release agreement as the "Old Colony Wharf strip," the defendant brought into court by paying the same to the clerk at the time of filing its answer.

The trial judge accepted the defendant's view of the right of election given in the mortgage, and allowed a foreclosure for the sums due and unpaid in principal, interest, and taxes, according to the terms of the mortgage at the time the decree was entered. He disallowed, however, the claims for damages arising out of the breach of the partial release agreement; disallowing also the defendant's demand for a release of the property for which tenders had theretofore been made, save and except the tender for the Old Colony Wharf strip, where the amount of the tender was brought into court and deposited with the clerk at the time of filing the answer. From the decree entered, both the plaintiff and the defendant, Fairhaven Land Company, have appealed.

The errors assigned on the part of the Bartlett Estate Company are three in number, namely: (1) that the court erred in refusing to adjudge the entire indebtedness represented by the notes and mortgage to be due and payable, and in refusing to enter a decree of foreclosure for the entire indebtedness; (2) that the court erred in releasing from the operation of the mortgage the tract known as the Old Colony Wharf strip; and (3) that the court erred in refusing to allow an attorney's fee based on the recovery of the entire indebtedness.

The record does not disclose the reason given by the learned trial judge for refusing to permit the present owner of the mortgage to exercise the option therein given to declare the entire debt due on a failure to pay the installments of principal, interest, and taxes, as they matured, but it is said that he so held because the right to exercise this option was not granted in terms to an assignee of the mortgage, and hence

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held that the right was a personal privilege of the original mortgagee which he could not pass to a third person by assignment. It seems to us that the conclusion does not necessarily follow from the fact. At common law, and formerly in many of the states of the Union, a mortgage was regarded as a conveyance passing the fee of the property mortgaged to the mortgagee, and it was thought, following the analogy of an ordinary deed of conveyance, that words of inheritance or of succession were necessary if the instrument was to operate as anything more than a mere personal grant to the mortgagee. But in this state the rule that words of inheritance or of succession are necessary to pass a fee is no longer applicable even to deeds, where the purpose of the instrument is to convey title in fee. Bal. Code, §§ 4519, 4520, 4525 (P. C. §§ 4451, 4452, 4437). Much less is it applicable to a mortgage, which is nothing more than a mere lien or security for debt, and which passes to the assignee by an assignment of the debt without any formal assignment of the mortgage itself. It must follow from this, we think, that the assignee takes the security with the debt, having all the rights therein possessed by his assignor. It is possible, of course, to make a mortgage with covenants personal to the mortgagee which will not pass by assignment, but to do so the intent must be expressed in clear and unmistakable language; it is not so expressed by a mere omission to add words of inheritance or of succession to the covenants of the mortgage.

The cases where this question is presented and determined seem not to be many. It was before the court in *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883. In that case the covenant in the mortgage was as follows:

“In case default be made in the payment of either principal or any installment of interest, as provided, then the whole sum of principal and interest shall be due at the option of the party of the second part (the mortgagee), and suit of foreclosure may be brought immediately.”

and the court held that it inured to the benefit of the assignees of the mortgage, giving them the right to elect to

consider the entire debt due on the failure to pay an instalment of interest falling due prior to the maturity of the principal debt. To the same effect are the cases of *Brand v. Smith*, 99 Mich. 395, 58 N. W. 363, and *New England Loan & Trust Co. v. Robinson*, 56 Neb. 50, 76 N. W. 415, 71 Am. St. 657. So in 27 Cyc. 1309, it is said:

"The assignee of a mortgage may maintain in his own name a bill in equity, or a statutory action for its foreclosure; and if the mortgage gives the right to foreclose on default in the payment of interest or of any instalment of principal, anticipating the maturity of the rest, this right may be exercised by the assignee as well as by the original mortgagee."

And in Jones on Mortgages, § 1182a, it is said that an assignee of a mortgage may exercise this option in the same way that the mortgagee himself may. Of the cases cited as maintaining the contrary doctrine we have found none directly in point. Those more nearly analogous are founded on the earlier view of a mortgage; namely, that it operated as a conveyance of the mortgaged property, and, as we have shown, are not applicable in a jurisdiction where a mortgage is regarded as a mere lien for the security of a debt. We conclude, therefore, that the court erred in refusing to hold the entire mortgage debt due and the mortgage ripe for foreclosure.

The second assignment is answered by the language of the release agreement itself. As shown by the quotation before made, it is provided that any one or more of such partial payments could be made "prior to maturity" of the mortgage debt. This must mean a time prior to the election of the mortgagee to declare the entire debt due and payable, for a mortgage due by election of the mortgagee is as fully matured as is one due by the expiration of the extreme limit of time fixed for payment. In other words, a mortgage due for the purposes of foreclosure is due for all purposes, and when the right of foreclosure for the entire debt exists, no right which must be exercised before maturity of the debt can be exer-

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cised after foreclosure has been begun. The court erred, therefore, in allowing a partial release after foreclosure proceedings had been begun.

It follows also from the foregoing that the third assignment of error is well taken, and that the court should have allowed an attorney's fee based on a recovery of the entire indebtedness.

The assignments of error on the part of the Fairhaven Land Company, are in the main met by the conclusion we have reached on the question of the assignability of the right to exercise the election to declare the entire debt due, and the right to secure releases by making partial payments after the exercise of that election. The defendant, however, contends that the court erred in striking from its answers as immaterial certain paragraphs wherein it recited the history of the transaction between itself and one Erastus Bartlett, the predecessor in interest of the plaintiff, which gave rise to the creation of the indebtedness sued upon; the purpose being to aid in the interpretation of the writings between the parties. But it is only where the writing is in itself ambiguous and capable of different constructions that the court is permitted to call upon extrinsic evidence to aid in its construction. The true meaning of the terms of a mortgage, like the meaning of the terms in other written instruments, must be gathered from the writing itself where it is plain and unambiguous; it cannot be added to or varied by showing extrinsic matters, or a prior or contemporaneous parol agreement.

It is urged also that the court erred in refusing to permit the appellant to prove the facts set forth in the third paragraph of its second affirmative defense, to the effect that, subsequent to the commencement of the foreclosure action, it contracted to sell portions of the mortgaged property for sums sufficient to pay all that was then in default upon the mortgage debt, and would have received such sums had the mortgagee executed releases as demanded. But this was after the mortgagee had exercised its option, and it was then

too late for the mortgagor to demand releases as a matter of right. To prove, therefore, that it could then have sold enough of the mortgaged property to pay the amount of the debt in arrears constituted no defense to the action, and it was not error to exclude the proffered evidence.

Other questions suggested are met by what we have said in connection with the plaintiff's appeal, and require no separate consideration.

The judgment appealed from is reversed, and the cause remanded with instructions to enter the usual judgment foreclosing the mortgage for the entire mortgage debt, disallowing the application to release the tract known and described in the mortgage as the Old Colony Wharf strip, and allowing to the plaintiff a reasonable attorney's fee based on the recovery of the entire mortgage debt. The appellant, Bartlett Estate Company, will recover its costs on appeal.

MOUNT, Root, and RUDKIN, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6613. Decided March 26, 1908.]

B. L. MUIR, Respondent, v. M. J. JOHNSON, Appellant.¹

NAVIGABLE WATERS—OBSTRUCTIONS—RIGHT TO INJUNCTION—RIPARIAN OR LITTORAL RIGHTS—"SHORE LANDS"—PREFERENCE RIGHTS. A littoral owner on the shore of a navigable lake cannot, by virtue of his riparian or littoral rights, maintain an action for an injunction against the maintenance of piling, boat houses, and permanent fixtures in front of his land, since the state is the owner of the bed of the lake; nor can such action be maintained by virtue of his preference right to purchase "shore lands," where the state has not established harbor lines, and the fixtures are maintained below the line of low water mark, it not appearing whether in water of sufficient depth for ordinary navigation.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 5, 1906, upon findings in

¹Reported in 94 Pac. 899.

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favor of the plaintiff, after a trial on the merits before the court without a jury, granting an injunction to compel the removal of obstructions placed upon a navigable lake and to restrain the placing and maintaining of the same thereon. Reversed.

Jerold Landon Finch, for appellant.

Vince H. Faben, for respondent.

FULLERTON, J.—The respondent is the owner of lot 1, in block 74, of Burke's Second Addition to the city of Seattle. This block is bounded on the east side by the waters of Lake Washington, or, to speak more accurately, by the meander line run by the government surveyors to mark the line between the waters of the lake and the upland.

The appellant as early as 1889 built a boathouse immediately to the north of lot 1, in block 74, in a street called Jackson street. As originally constructed the boathouse lay partly on the shore and partly over the water, and was wholly within the street. Later on, from time to time, additions were built thereto, extending farther into the lake, and piles were driven still further out in such a manner as to furnish mooring places for boats. In 1902 the appellant caused some thirty piles to be driven in the bed of the lake to the east and south of his boathouse. These were driven in rows of five piles each about 12 feet apart, three rows of which extended across the front of lot 1, in block 74, the inner piling being about 75 feet distant therefrom. These piles he used as a mooring place for scows and launches brought to his shop to be repaired, and some months prior to the commencement of the action, he also moored a floating house boat between the piles and the lakeward boundary of lot 1. This boathouse was thirty feet in length and lay partly in Jackson street and partly in front of lot 1 and within a few feet of the boundary line of the lot; both the house boat and the piles, however, were wholly within the waters of the lake below the line of low water mark.

In this action the respondent sought a mandatory injunction compelling the removal of the house boat and so many of the piles driven in the bed of the lake as stood in front of lot 1, and a preventive injunction to restrain the appellant from placing and maintaining house boats, piles, and other permanent fixtures in front of the lot. In his complaint the respondent rested his right to injunctive relief on the ground that the acts of the appellant amounted to an unlawful interference with his riparian and littoral rights as owner and possessor of lot 1, in block 74. The trial court, adopting this theory, entered judgment in his favor restraining the appellant from maintaining permanent fixtures of any kind in the waters of the lake in front of lot 1, and ordering the house boat and piling now in its front to be removed.

In so far as the judgment of the court rests upon the ground that the structures ordered removed violate the respondent's riparian and littoral rights, it is manifest that it cannot be maintained. As early as the case of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, this court held that the owner of uplands bordering on navigable waters as such had no riparian or littoral rights in such waters as would enable him to maintain an injunction from interference therewith. This holding was based on the ground that between the boundary of the upland and the navigable waters proper there were shore lands which belonged to the state and to which all riparian and littoral rights attached, and the state, or its grantee after it conveyed the lands, had the sole right to complain of obstructions placed between the lands and the navigable waters of the river, lake or other body of water upon which they bordered. And plainly this must be so, for to contend otherwise is to contend that the state does not hold its tide and shore lands by title in fee, as it holds its other lands, but holds them in subordination to such rights as the common law granted an upland owner. But this is not what was meant by the declaration in the state constitution. When the state in that instrument (Const., art. 17, § 1),

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asserted "its ownership to the beds and shores of all navigable waters in the state, up to and including the line of ordinary high tide in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes," it meant to assert title in fee to such lands, and unless it is to be held that it was without power to reserve to itself such lands, it must be held that the upland owner, merely as such, has no interest therein. On the ground that he is a riparian proprietor, therefore, the respondent cannot maintain injunction to restrain the appellant from occupying the navigable waters of Lake Washington in front of his upland property.

This court, however, has held that the upland owner, in virtue of the fact that the legislature has given him the preference right to purchase the shore and tide lands lying in front of his uplands when such shore and tide lands shall be offered for sale by the state, can maintain injunction to prevent the obstruction of the same by a trespasser, or to remove obstructions placed thereon subsequent to March 26, 1890. *West Coast Imp. Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441. If, therefore, the place where the house boat is moored or the piles are driven can be said to be "shore lands," then the judgment entered can be maintained on the authority of that case. We have examined the record with this thought in view, but are unable to find therefrom that such lands are shore lands. The state has not established harbor lines on this part of the lake nor has the legislature defined such lands other than as "lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow." Laws 1897, p. 230, ch. 89, § 4. This description, as we said in *Van Siclen v. Muir*, 46 Wash. 38, 89 Pac. 188, is not definite where harbor lines have not been established, since it does not define the water boundary of the lands, and while we held in that case that it would certainly include all lands lying between ordinary high and low water, and might include all land lying between the up-

land and water of sufficient depth for ordinary navigation, the rule does not aid us here, as it appears that the boat is moored and the piles are driven below the line of low water, but whether in water of sufficient depth for ordinary navigation the record is silent.

The judgment appealed from is therefore reversed, and the cause remanded with instructions to enter a decree to the effect that the respondent take nothing by his action, and that the appellant recover his costs.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

[No. 6620. Decided March 27, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Wm. T. Milliken et al., Appellant, v. BOARD OF COMMISSIONERS OF SPOKANE COUNTY, Respondent.*¹

ELECTIONS — MAJORITY—STATUTES —CONSTRUCTION — COUNTIES — TOWNSHIP ORGANIZATION. Const. art. 2, § 4, providing for the establishment of township organization "whenever a majority of the qualified electors of such county voting at a general election shall so determine" does not authorize township organization upon a majority of those voting upon the question, although the legislature so construed the clause in Laws 1895, p. 473, but only upon a majority of the total votes cast at the election.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered January 2, 1907, denying a writ of mandamus, after a trial on the merits before the court without a jury. Affirmed.

William E. Richardson and Crow & Richardson, for appellant, cited: *Walker v. Oswald*, 68 Md. 146; *Sanford v. Prentice*, 28 Wis. 358; *Gillespie v. Palmer*, 20 Wis. 572; *People ex rel. Furman v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed.

¹Reported in 94 Pac. 897.

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416; *St. Joseph Township v. Rogers*, 16 Wall. 644, 21 L. Ed. 328; *Reiger v. Commissioners*, 70 N. C. 319; *Metcalf v. Seattle*, 1 Wash. 297, 29 Pac. 1010; *Strain v. Young*, 25 Wash. 578, 66 Pac. 64; *Fox v. Seattle*, 43 Wash. 74, 86 Pac. 379; *Montgomery County Fiscal Court v. Trimble*, 104 Ky. App. 629, 47 S. W. 773.

Richard M. Barnhart and *A. J. Laughon*, for respondent, cited: *State ex rel. Jones v. Lancaster County Com'r's*, 6 Neb. 474; *State v. Babcock*, 17 Neb. 188, 22 N. W. 372; *People ex rel. Davenport v. Brown*, 11 Ill. 479; *Bryan v. Stephenson*, 50 Neb. 620, 70 N. W. 252, 35 L. R. A. 752; *State v. Langlie*, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723; *State ex rel. Douglas County v. Cornell*, 53 Neb. 556, 74 N. W. 59, 68 Am. St. 629, 39 L. R. A. 513; *State v. Foraker*, 46 Ohio St. 677, 23 N. E. 491, 6 L. R. A. 422; *People v. Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838; *State v. Francis*, 95 Mo. 44, 8 S. W. 1; *State v. Winkelmeier*, 35 Mo. 103; *State ex rel. Dobbins v. Sutterfield*, 54 Mo. 391; *State ex rel. Woodson v. Brassfield*, 67 Mo. 331; *State ex rel. Allen v. Mayor of St. Louis*, 73 Mo. 435; *People ex rel. Wheat v. Wiant*, 48 Ill. 263; *Enyart v. Trustees of Hanover Township*, 25 Ohio St. 618; *State v. Swift*, 69 Ind. 505; *Bayard v. Klinge*, 16 Minn. 249; *Green v. State Board of Canvassers*, 5 Idaho 130, 47 Pac. 259, 95 Am. St. 169; *State ex rel. Litson v. McGowan*, 138 Mo. 187, 39 S. W. 771; *State ex rel. McClurg v. Powell*, 77 Miss. 543, 27 South. 927, 48 L. R. A. 652; *Stebbins v. Judge of Superior Court*, 108 Mich. 693, 66 N. W. 594.

MOUNT, J.—This appeal is from an order of the lower court refusing to grant a writ of mandate requiring the board of county commissioners of Spokane county to divide that county into township organization. It appears from the petition of the relators that, at the regular general election held in November, 1906, the board of county commis-

sioners of Spokane county duly submitted to the voters of that county the question of adopting township organization, as provided for by the act of March 23, 1895, Laws 1895, p. 472. At this election the total number of votes cast in Spokane county was 11,373. The total number in favor of township organization was 3,585, and against was 820. Thereupon the board of county commissioners declined to divide the surveyed portion of the county outside of incorporated cities and towns into organized townships; whereupon this action was begun, and the trial court refused the writ upon the ground that a majority of the qualified voters voting at the general election did not vote in favor of the question. The only point in the case is, whether the constitution requires a majority of the electors voting at the election, or a majority of those voting on the question. The constitutional provision is as follows:

"The legislature shall establish a system of county government, which shall be uniform throughout the state, and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine." (Const. art. 2, § 4.

The act of 1895, passed pursuant to this constitutional provision, contains a provision as follows:

"Should the majority of the votes cast on the question of township organization be in favor thereof, it shall be the duty of the board of county commissioners, at their next meeting after such election, or as soon thereafter as practicable, to divide all the surveyed portion of the county, outside of incorporated cities, towns and villages, into organized townships." Laws 1895, p. 473, § 4.

It is conceded that a majority of the votes cast on the question were in favor of township organization; but it is contended by the respondent that the constitution requires a majority of the qualified voters of the county voting at the election, and that the act of 1895 should be construed to ac-

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cord with the constitution in this respect. The wording of the constitutional provision above quoted seems plain. It is:

"The legislature . . . by general laws shall provide for township organization . . . whenever a majority of the qualified electors of such county voting at a general election shall so determine."

These words mean what they say. They seem too plain for construction, and we should not notice them further were it not for the fact that the legislature, by the provision of the act of 1895 above quoted, seems to have construed the language to mean what it does not say, and to the effect that where a majority of the votes cast "on the question" be in favor thereof, then the county commissioners shall provide for township organization. This court, in *Metcalfe v. Seattle*, 1 Wash. 297, 29 Pac. 1010, considering the provisions of § 6, art. 8, of the constitution, that no city shall become indebted to exceed one and one-half per centum of the taxable property therein, "without the assent of three-fifths of the voters voting at an election to be held for that purpose," held that this meant three-fifths of the voters actually voting at the election, exclusive of those who were entitled to vote; and in *Strain v. Young*, 25 Wash. 578, 66 Pac. 64, where the same question was submitted at a general election and the proper construction of this provision of the constitution again came before this court, we held that the same provision was satisfied by a majority of three-fifths of the voters who voted *on the question*; and later, in *Fox v. Seattle*, 43 Wash. 74, 86 Pac. 379, where there was a question as to the meaning of the provision of the city charter which related to this same section of the state constitution, we held that the charter and the constitution required the assent of three-fifths of the voters voting on the question, and that the clause "three-fifths of the voters therein voting at an election to be held for that purpose," means an election held for that particular purpose even though the vote was taken at a general election. The provision of the constitution considered in each of these cases

is materially different from the language under consideration in this case. The language here is, "Whenever a majority of the qualified electors of such county voting at a general election shall so determine;" not "voting at an election to be held for that purpose," or "voting on the proposition," or "upon that question," or "thereon," as is stated in other places in the constitution, but *voting at a general election*.

The framers of the constitution used different words to express the same idea in different provisions of the constitution, but words used to express the same idea, though different, are all definite and clearly express the idea intended. For example, in § 3, art. 8, relating to state indebtedness, the constitution provides: "No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes *cast for and against it* at such election." And § 2 of art. 11 provides: "No county seat shall be removed unless three-fifths of the qualified electors of the county *voting on the proposition* at a general election shall vote in favor of such removal, and three-fifths of all votes cast *on the proposition* shall be required to relocate a county seat." Section 1, art. 14, provides: "A majority of all the votes cast at said election upon *said question*, shall be necessary to determine the permanent location of the seat of government for the state." Section 2, art. 14, provides: "The location thereof shall not thereafter be changed except by a vote of two-thirds of all the qualified electors of the state *voting on that question*, at a general election, at which the question of location of the seat of government shall have been submitted by the legislature." Section 1, art. 23, provides: "Any amendment or amendments to this constitution may be proposed . . . and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors *voting thereon*, the same shall become a part of the constitution." The italicized words in these provisions show clearly

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what votes were to be considered in determining the majority. Section 4, art. 11, provides: "The legislature . . . shall provide for township organization . . . whenever a majority of the qualified electors of such county voting *at a general election* shall so determine." Section 2, art. 23, provides: "Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and if a majority of all electors voting *at said election* shall have voted for a convention, the legislature shall at the next session provide by law for calling the same." These two sections of the constitution are definite and certain; they convey the idea which the framers of the constitution intended to convey, and the whole thereof. When we consider all these provisions of the constitution and see how specific and definite each section is, it seems clear that the framers meant exactly what they said in each provision, and that when they used the words, "Whenever a majority of the qualified electors of such county voting *at a general election* shall so determine," found in art. 11, § 4, they meant a majority of the electors voting *at a general election* irrespective of the questions upon which the vote was taken. Otherwise it would have been stated in this as it was in other sections.

Numerous cases are cited in the briefs, some upholding and others opposed to the construction we have placed on this provision of our constitution. We think we are not justified in extending this opinion so as to comment on, or quote from, these cases. The question is merely one of construction, upon which cited cases throw little light except in stating general rules. We are satisfied the lower court placed the right construction upon the constitutional provision under consideration, and the judgment must therefore be affirmed.

HADLEY, C. J., FULLERTON, Root, RUDKIN, CROW, and DUNBAR, JJ., concur.

[No. 6882. Decided March 27, 1908.]

**ANTHONY J. McMILLAN, Plaintiff and Appellant, v. NORTHPORT SMELTING AND REFINING COMPANY, Defendant
and Appellant.¹**

ATTORNEY AND CLIENT—COMPENSATION—REASONABLENESS. Three thousand five hundred dollars is an unreasonable allowance for attorney's fees for services rendered in securing a restraining order preventing the dismanteling of a smelter and the removal of machinery, the property being worth \$250,000, where it appears that the application therefor was not contested and the order was continued in force from time to time without resistance, the complaint embracing only six pages of typewritten matter (Root, FULLERTON and CROW, JJ., dissenting).

Cross-appeals from a judgment of the superior court for Stevens county, Kennan, J., entered January 12, 1907, awarding to plaintiff the sum of \$3,500 as an attorney's fee, after a trial before the court without a jury. Reversed.

Nuzum & Nuzum, for plaintiff.

Voorhees & Voorhees and *Charles Francis Voorhees*, for defendant.

MOUNT, J.—The only question in this case is the reasonableness of an attorney's fee. The facts are as follows: On October 24, 1905, the plaintiff brought an action in the superior court of Stevens county against the Northport Smelting & Refining Company, A. I. Goodell, and John H. Mackenzie, to restrain the defendants from dismantling the Northport smelter and from removing certain machinery therefrom. On the same day, the complaint and affidavit were presented *ex parte* to the judge of the court and a temporary emergency restraining order was issued, the plaintiff furnishing a bond in the sum of \$1,000. November 6, 1905,

¹Reported in 94 Pac. 761.

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was fixed for the hearing on the application for a restraining order. The order was regularly served. No appearance was made by the defendants to the complaint or to resist the restraining order, and the same was continued in force from time to time by order of the court, without resistance. Afterwards, on September 26, 1906, the plaintiff filed his supplemental complaint, alleging that there was no longer any necessity for the restraining order, and praying to have the action dismissed and for an allowance for attorney's fees against the property of the Northport Smelting & Refining Company. The defendant appeared at the hearing on this supplemental complaint and resisted only the amount of the claim for attorney's fees. At this hearing the court found that the restraining order saved to the smelting company the property of the company valued at \$250,000 to \$275,000; that \$165.85 had been expended in that behalf by the plaintiff, and that \$3,500 was a reasonable fee to be paid to the plaintiff's attorneys. Both parties have appealed.

The defendant alleges that the allowance of \$3,500 is excessive, and plaintiff claims that \$10,000 is a proper fee. The record shows the parties stipulated, at the hearing on the reasonableness of the fee, that certain attorneys would testify that a reasonable fee for plaintiff's attorneys under all the circumstances surrounding the case would be a sum not less than \$7,500 nor more than \$10,000, and that certain other attorneys under the same circumstances would place such fee at from \$500 to \$1,000. The case was not a complicated one. The complaint embraced only six pages of typewritten matter, and there appears nothing out of the ordinary either in the law or the facts. It is true a large amount of property was involved, but there was no resistance to the restraining order or to the complaint. The plaintiff's attorneys gave very little time to the case. Taking all these circumstances into consideration, we think that \$1,000 is a liberal allowance for the plaintiff's attorney's fees.

The judgment is therefore reversed, and the cause re-

manded with directions to the lower court to reduce the attorney's fees to \$1,000.

HADLEY, C. J., RUDKIN, and DUNBAR, JJ., concur.

ROOT, J. (dissenting)—In view of the large amount involved and the responsibility necessarily assumed by the attorneys, I think \$1,000 an inadequate allowance. I therefore dissent.

FULLERTON and CROW, JJ., concur with Root, J.

[No. 6814. Decided March 28, 1908.]

THE STATE OF WASHINGTON, *on the Relation of North Coast Railway, Plaintiff, v. NORTHERN PACIFIC RAILWAY COMPANY, Respondent.*¹

EMINENT DOMAIN—RAILROADS—CROSSINGS—CONDITIONS — COST OF MAINTENANCE. In condemning the right to cross at grade the right of way of a prior railroad company, it is proper to charge to the petitioner the cost of installing and maintaining a necessary interlocking device as to the tracks already in operation, or to be constructed within a reasonable time by the prior company to accommodate business already accumulated; but it is error to cover any or all tracks that the prior company might construct at that point in the future, or to confine the petitioner to a single track, as future contingencies should be left to future determination.

Certiorari to review a judgment of the superior court for Yakima county, Rigg, J., entered May 24, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in condemnation proceedings, granting to a railway company the right to establish a crossing over the right of way belonging to another company. Modified.

H. J. Snively and Danson & Williams (Fred H. Moore, of counsel), for relator, contended that, a railroad is a quasi-

¹Reported in 94 Pac. 907.

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Citations of Counsel.

public corporation, or a corporation affected with a public interest. *Township of Pine Grove v. Talcott*, 86 U. S. 666, 22 L. Ed. 227; *Olcott v. Supervisors*, 83 U. S. 678, 21 L. Ed. 382; *McCoy v. Cincinnati, St. Louis etc. R. Co.*, 13 Fed. 3; *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Stewart v. Erie & Western Transp. Co.*, 17 Minn. 372; *People v. New York Cent. etc. R. Co.*, 28 Hun. 543. The acceptance of the charter implies that the corporation assumes certain public obligations and takes its charter subject to the servitude of them. *People v. New York etc. R. Co.*, 28 Hun. 308; *Abbott v. Johnstown etc. R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, 30 Ohio St. 604. These obligations must be performed, even if at financial loss. *People v. New York Cent. etc. R. Co., supra*; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933; *Wisconsin etc. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; *People ex rel. Green v. Dutchess etc. R. Co.*, 58 N. Y. 152. The interest of a railroad in its right of way is not unqualified; it is in the nature of a right of user or easement for the public benefit. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co., supra*; *Boston & Albany R. Co. v. Greenbush*, 5 Lansing (N. Y.) 461; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Tolcdo etc. R. Co. v. Deacon*, 63 Ill. 91; *New York etc. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Lake Shore etc. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Wisconsin etc. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. In the exercise of its power the state may compel a railroad to fence its right of way. *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Minneapolis etc. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585. Or to abandon its grade crossings. *State v.*

Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772; *New York etc. R. Co. v. Bristol*, *supra*; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87; *Chicago etc. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948. Or so grade its track as to make crossings convenient and useful. *People ex rel. Green v. Dutchess etc. R. Co.*, *supra*; *People v. New York Cent. etc. R. Co.*, 74 N. Y. 302; *Indianapolis etc. R. Co. v. State ex rel. Lawrenceburg*, 37 Ind. 489. Or install new and additional safety devices at any time the public safety demands it. *Detroit etc. R. Co. v. Osborn*, 127 Mich. 219, 86 N. W. 842, 62 L. R. A. 149; affirmed in 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860; *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, *supra*. Where a junior crosses a senior road the cost of maintaining and operating the necessary safety devices is to be borne equally by the two roads. *Seattle & M. R. Co. v. State*, *supra*; *Kansas City S. B. R. Co. v. Kansas City, St. Louis etc. R. Co.*, 118 Mo. 599, 24 S. W. 478; *Chicago & Alton R. Co. v. Joliet etc. R. Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Flint etc. R. Co. v. Detroit etc. R. Co.*, 64 Mich. 350, 31 N. W. 281; *Massachusetts Cent. R. Co. v. Boston etc. R. Co.*, 121 Mass. 124. The mere fact of prior location does not give one road, as against another, seeking to condemn a crossing, a superior right. *Colorado etc. R. Co. v. Union Pac. R. Co.*, 41 Fed. 293; *Seattle & M. R. Co. v. State*, *supra*. When the junior road has paid the expense of installing the safety devices and restored the road to a condition where it can be safely operated, there can be no recovery for losses necessarily incidental to the crossing itself. *Boston etc. R. Co. v. Old Colony etc. R. Co.*, 3 Allen 142; *Massachusetts Cent. R. Co. v. Boston etc. R. Co.*; *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, and *Flint etc. R. Co. v. Detroit R. Co.*, *supra*; *St. Louis Transfer R. Co. v. St. Louis, Merchants' Bridge Terminal R. Co.*, 111 Mo. 666, 20 S. W. 319; *Kansas City S. B. R. Co. v. Kansas City, St. Louis etc. R. Co.*, *supra*; *Peoria & Pekin Union R. Co. v.*

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Peoria & Farmington R. Co., 105 Ill. 110; *Chicago & Alton R. Co. v. Joliet etc. R. Co., supra*; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, Fed. Cas. No. 2,665. Legislative rules requiring the senior road to bear one-half the expense of operating crossings are but declaratory of the common law. *Minneapolis & St. Louis R. Co. v. Gowrie & N. W. R. Co.*, 123 Iowa 543, 99 N. W. 181; *Kansas City S. B. R. Co. v. Kansas City, St. Louis etc. R. Co., supra*.

Ira P. Englehart and B. S. Grosscup, for respondent.

FULLERTON, J.—The relator is a railroad company, authorized by its charter to construct, operate and maintain railroads in this state and elsewhere, particularly from the city of Walla Walla to the city of Seattle by way of the Yakima Valley. In the construction of its road it found it necessary to cross the right of way and track of the Northern Pacific Railway Company at a point in Yakima county, and being unable to agree with that company as to the place and manner of crossing, brought condemnation proceedings in the court of that county to acquire the right so to cross. The trial court entered a decree granting the right, but annexed terms and conditions thereto which the relator conceived not to be in accordance with its rights in the premises, and it brought the proceedings into this court by a writ of review.

The evidence introduced at the hearing in the trial court is not in the record, and we are controlled as to the facts by the findings of the trial judge. Those material to the questions presented are, in substance, these:

"That the said claimant, Northern Pacific Railway Company, has occupied the point where petitioner seeks to cross said railroad by a line of railroad for many years; that the point where petitioner seeks to cross the railroad track of said Northern Pacific Railway Company is in a level section of the country, and that said point is suitable for a grade crossing, the surrounding country for about two miles north of Parker Siding, and for several miles south thereof being a

comparatively level prairie; that a grade crossing of the two railroads is the natural crossing; that to require the two railroads to cross at separate grades it would be necessary for the petitioner to construct an artificial fill or embankment extending from a point about two miles south of Parker Siding to a point about two miles north thereof; said fill or embankment ranging in height from zero where the grade starts at each end to about 25 feet at the point of crossing, thus causing what is known as an adverse grade; that if such an embankment were constructed on petitioner's line it would be practically impossible for petitioner to maintain a station either at Parker Siding or between Parker Siding and Union Gap, or any place between Parker Siding and a point two miles south of said siding; that such an embankment would greatly inconvenience petitioner if it should desire to extend a branch over any place on the reservation lying west of said siding.

"That if the two railroads cross at the same grade by installing and operating a suitable and proper interlocking and derailing device, the dangers of accidents, so far as the crossing is concerned, is very slight; that with such a device it is necessary for a train on one road to stop only when the crossing is being used by a train on the other road; that there are standard devices of this character in general use at crossings of this character; that it is necessary and proper that a standard interlocking device should be installed at such crossing for the safety of the public and the safe operation of the trains on both roads.

"That the cost of installing an interlocking plant at this point will be about \$7,500; that the annual cost of operating and maintaining said interlocking plant will amount to 5 per cent upon the sum of \$75,000, from which the court finds that the value to the petitioner of constructing its roads so as to separate the grades of the two roads would be the sum of \$75,000, excluding the contingent and uncertain elements of damage, including danger and delay of operation.

"That it would cost, to separate the grades at this point between the sum of \$175,000 and the sum of \$200,000.

"That the claimant, Northern Pacific Railway Company, has offered in open court, by due authority, to pay one-half of said cost over and above the sum of \$75,000 in order to avoid the dangers and delays incident to any grade crossing.

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"That the claimant, Northern Pacific Railway Company, acquired its right of way and constructed its road at the point of the proposed crossing prior to the year 1885, and now has the *bona fide* intention, within the near future, of double tracking its line of railroad at the point of the proposed crossing, and that such double tracking is a necessity. The claimant, Northern Pacific Railway Company, at said point, by reason of prior location and plan of increasing its trackage, has the prior right at said point, and should be permitted to construct without hindrance, additional tracks. A grade crossing at said point without the protection of the standard interlocking plant would involve great danger to persons and property, and the situation is such that it will not be permitted."

As conclusions of law from the foregoing facts the court held that the relator was entitled to cross the defendant's track at grade; that an interlocking device was necessary and should be installed; that the relator should be charged not only with the expense of installing the device but also with its maintenance and operation; that the expense of such installation and maintenance should include any additional tracks the defendant, or its successors or assigns, should desire to construct and operate at the point of crossing; and that the right of the relator to cross the defendant's track be confined to a single track. A decree was entered accordingly.

The errors assigned, while somewhat numerous, suggest but two principal questions; first, did the court err in charging the cost of maintaining and operating the interlocking device required to be installed to the relator; and second, did the court err in requiring that the relator provide and maintain interlocking devices for all additional tracks that the defendant may construct in the future at the point of crossing, and in limiting the relator to a single track.

In regard to the first question, we think it must be answered in the negative. It is true that the right of one railroad to cross the right of way and track of another is granted in this state by both the constitution and statute, and exists, perhaps, as a natural right independent of either, yet we

think this does not argue against the right of the road whose right of way and track is crossed to be made whole for all damages that directly ensue by reason of such crossing. The constitutional provision that private property shall not be taken or damaged for public or private use without just compensation having been first made and paid into court for the owner, applies to property owned by a railroad company as well as to property owned by an individual. Although the property of a railroad company may be devoted to a public use, and be subject to control by the public authorities, the property itself is nevertheless private property. For injuries to it, for trespasses upon it, for its wrongful taking, actions will lie at the suit of the railroad company to the same extent as will actions by a private person where wrongful assaults have been made upon his property. Nor is there any distinction in this respect between a railroad's right of way and its other property. It is all, even its franchise, subject to sale on execution. In fine, the property of a railroad company is but private property burdened with a public use. As was said by Mr. Justice McKenna, in *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 570, 25 Sup. Ct. 133:

"A railroad's right of way has, . . . the substantiality of a fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power is, . . . reasonable compensation to the owner of the property taken."

That the burden of maintaining an interlocking device at the point of crossing of these roads is an actual damage to the defendant company cannot be questioned. Indeed, the trial judge found, and that finding cannot be questioned here, that it would amount annually to so considerable a sum as five per

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centum on \$75,000. That it is the direct result of the relator's act in crossing the defendant's road is likewise beyond questioning. Why then should it not be charged to the company for whose benefit it is occasioned? It seems to us that the question admits of but one answer; it should be so charged.

This question was before the supreme court of Minnesota in *Winona etc. R. Co. v. Chicago etc. R. Co.*, 50 Minn. 300, 52 N. W. 657. In prescribing the terms under which the second road might cross the first, the trial court required that latter should install and maintain at its own cost an interlocking device so as to enable trains to pass the crossing without stopping and without danger of collision. On appeal by the road desiring to make the crossing, this order was held to be within the power of the trial court. On the question of cost the court said:

"The purposes for which such requirements may be made reach beyond the mere construction of the crossing, the laying the rails across, and extend to its operation after the merely mechanical work of getting across is done, and for that reason the court may prescribe not only what it may decide to be necessary in constructing the crossing to make it least injurious to the corporation whose track is crossed, but it may also prescribe that the condition which it may deem proper shall be maintained. Of course, where the action of the crossing corporation makes necessary the expense of doing what the court prescribes for the purpose of putting and keeping the crossing in proper condition so as to do least injury to the corporation whose track is crossed, the court may require it to bear such expense."

In Montana, in the well considered case of *Butte etc. R. Co. v. Montana U. R. Co.*, 16 Mont. 504, 41 Pac. 232, 50 Am. St. 508, 31 L. R. A. 298, the court held it proper to provide that the expenses of a watchman found necessary to be stationed at the point of crossing another railroad track should be borne by the road desiring the right to cross. So in *Flint etc. R. Co. v. Detroit etc. R. Co.*, 64 Mich. 350, 31 N. W. 281, it was held that the cost of maintaining signals, or a crossing system, as well as of a watchman, was a proper

element to be considered by commissioners or a jury in awarding damages to a railroad company whose road is sought to be crossed by another railroad. See also, *Hydell v. Toledo etc. R. Co.*, 74 Ohio St. 138, 77 N. E. 1066; *Memphis etc. R. Co. v. Birmingham etc. R. Co.*, 96 Ala. 571, 11 South. 642, 18 L. R. A. 166; *Toledo etc. R. Co. v. Detroit etc. R. Co.*, 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875; *West Jersey etc. R. Co. v. Atlantic City & S. Traction Co.*, 65 N. J. Eq. 618, 56 Atl. 890; *Kansas Cent. R. Co. v. Com'rs of Jackson County*, 45 Kan. 716, 26 Pac. 394.

The relator placed its principal reliance upon the cases of *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, 30 Ohio St. 604; *Minneapolis etc. R. Co. v. Gowrie etc. R. Co.*, 123 Iowa 543, 99 N. W. 181, and *Detroit etc. R. Co. v. Osborn*, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860. But these cases are founded upon statutes which expressly provide that the expense of maintaining the crossing devices shall be apportioned between the roads. Whether such a statute would or would not be in conformity with our constitution we need not now inquire. But the fact that the cases were based on a statute deemed constitutional places them outside the question presented here.

In regard to the second question, we think the court should not have anticipated the future. Since it found that the defendant contemplated putting in an additional track in the near future to accommodate its already accumulated business, it was proper to provide that the interlocking device directed to be installed and maintained should cover the additional track should the same be actually laid within a reasonable time. But the order should not have included mere possibilities. It should not have included any and all additional tracks which the defendant might desire to construct and operate in the future at the point of crossing. It may be that changed conditions at the time the defendant desires to construct the additional tracks will render it inequitable that the relator provide and maintain the devices found necessary to

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safeguard the crossings, or it may be that the relator, when it makes the defendant whole for the present damage, has done its full duty, and from thenceforth stands on an equal footing with the defendant, and that justice will require that the cost of maintenance of safeguards made necessary by the changed conditions shall be borne by both companies, or by that company for whose benefit it is installed; but these are questions not now necessary to decide; they are suggested merely to illustrate the point that future contingencies had best be left to future determination. For the same reason the order confining the relator's right to cross to a single track should be modified. If it wishes now to install a double track with proper interlocking devices at its own cost for installation and maintenance, it ought to be permitted to do so. Should it in the future desire to double its track, the necessity therefor ought to be left for determination at that time.

The cause is remanded with instructions to modify the judgment in the particulars above indicated. In other respects it will stand affirmed. Neither party will recover costs.

MOUNT, RUDKIN, and DUNBAR, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6815. Decided March 28, 1908.]

COLUMBIA VALLEY RAILROAD COMPANY, *Appellant*, v.
PORTLAND & SEATTLE RAILWAY COMPANY,
*Respondent.*¹

RAILROADS—LOCATION OF LINE—PUBLIC LANDS—CONVEYANCE FROM STATE—DESCRIPTION—INJUNCTION—TRESPASS TO REAL PROPERTY—EVIDENCE—SUFFICIENCY. Upon an issue, in an action to restrain a trespass, as to a conflict between the survey and location of rights of way of rival railroad companies, over lands applied for and purchased from the state, the plaintiff company fails to establish any legal or equitable rights to the defendant's location, where it appears that the plaintiff's line was actually located on the ground in dispute in 1899, but was erroneously described in its application and field notes, and the plaintiff purchased land from the state with reference to such erroneous description, which lay to the north of the actual survey and of defendant's location, that the plaintiff did not proceed with the construction of its road for seven years, or intend to do so in the near future, and that defendant in 1905 made its location and purchased its right of way, denying actual knowledge of the plaintiff's mistake, the stakes of plaintiff's survey being destroyed or only distinguishable with difficulty; although the contour of the ground admitted of only one practicable route.

Appeal from a judgment of the superior court for Skamania county, McCredie, J., entered December 14, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to enjoin the construction of a railway line across lands claimed as a right of way by another railway company. Affirmed.

W. W. Cotton, Covert & Stapleton, and Ralph E. Moody, for appellant.

James B. Kerr and George T. Reid, for respondent.

FULLERTON, J.—The appellant and respondent are corporations, each having authority in virtue of its articles of incorporation to construct, maintain, and operate a railroad

¹Reported in 94 Pac. 918.

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along the north bank of the Columbia river where that river forms the southern boundary of this state. The appellant was incorporated in February, 1899, and the respondent in August, 1905. Immediately after its incorporation, the respondent began actively the work of construction, and to that end entered upon certain lands in section sixteen, in township one north, of range three west of the Willamette meridian, and began constructing a road bed and boring a tunnel through a promontory thereon. The appellant thereupon began this action to enjoin the respondent from so doing, alleging that the lands entered upon formed a part of its own right of way, and that the respondent had entered thereon without right.

The appellant bases its claim to the property upon both legal and equitable grounds. From the record it appears that, during the summer of 1899, it caused a line to be surveyed along the proposed route of its road, and in December of that year adopted the surveyed line as the line of definite location of its road. This line, as described and platted in the field notes and plats returned by its engineers, reported the line as crossing the boundary between sections 10 and 15 in the township and range above named, at a point 813 feet east of the corner to sections 9, 10, 15 and 16, from whence it proceeded in a southwesterly direction on stated courses and distances crossing the line between sections 15 and 16 at a point 631 feet south of the corner named, from whence it proceeded through section 16 on like stated courses and distances. Section 16 was originally school land belonging to the state of Washington. In April, 1901, the appellant applied to the board of state land commissioners to purchase a right of way over the section under the act of March 18, 1901. Laws 1901, p. 353. To that end it filed with its application, as required by the statute, a map showing the route of its proposed road together with the field notes of its definite location, which map and notes described the route of the road in the same manner that it was described in the field

notes of the survey originally returned by the engineers, and showed the ties to the section corner named as the same were thereon shown. The state had parted with its title to lot 4, in section 16, and the application to purchase was granted for all that part of the route lying west of lot 4. In making its application for a right of way to the state, however, the appellant did not file with the board of state land commissioners a copy of its articles of incorporation and due proofs of its organization thereunder, as required by the first section of the act of March 18, 1901, nor was the land sold pursuant to the law governing the public sale of state, school and granted lands.

The respondent located its road across the section in question in September, 1905, and in that month applied to purchase a right of way thereover under the act of March 18, 1901. Its map of definite location, and the field notes by which it was accompanied, showed that its line crossed the section line between sections 15 and 16 at a point 941.7 feet south of the corner to sections 9, 10, 15 and 16, and proceeded thence across the section on stated courses and distances that marked a line which lay wholly to the south of the appellant's survey and application. A certificate of purchase for a right of way over the tract was given it by the board of state land commissioners in the same month. Afterwards it brought condemnation proceedings and condemned a track seventy-five feet in width on each side of the center line of its road as surveyed. To this action, however, the appellant was not made a party.

After the respondent entered upon the ground and began its work of construction, the appellant resurveyed its line, when it found that the line as actually marked on the ground did not correspond with the field notes and maps returned by its engineers, but lay some three hundred feet to the south of the surveyed line, and almost entirely within the right of way conveyed to the respondent. There is some conflict in the evidence as to the condition of the markings on the ground at the time the respondent entered thereon. The appellant's

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engineers who retraced the surveys testified to finding a number of the station stakes with the station marks still upon them, and also that the transit hubs were in most instances still in place. One of the engineers testified, however, that some five or six lines had been run over the same ground and that they had difficulty in distinguishing between the hubs of the appellant's line and those of the other surveys. The respondent, on the other hand, denies that any of its officers or engineers had actual knowledge that the survey of the appellant's line deviated from the maps and field notes it had adopted as the definite line of location of its proposed road and filed in the office of the board of state land commissioners. But it was made to appear that the contour of the ground for the greater distance across this section was such that the only practicable route for a road was at or near the line of the survey as actually made by the appellant and over which the respondent was proceeding to construct its road.

On the foregoing facts appearing, the trial court held that the respondent was the owner of the land in question, and that the appellant had no title thereto, either legal or equitable, on which it could maintain injunction. It seems to us that this conclusion is just. Whatever may have been the intent of the appellant, it is manifest that the state did not convey to it the property which it now claims. Conceding that it sufficiently complied with the statute in making its application, the tract applied for lies entirely to the north of the tract claimed, and as this description is definite and certain, the legal effect of the conveyance is to convey the tract described and that tract only.

But the appellant insists that the line as actually surveyed and marked on the ground must be taken as the true line wherever there is a conflict between such line and the line as described in the field notes and plats, and since the proofs were clear that the respondent entered upon its surveyed line, the trial court erred in failing to hold that there had been a trespass. It may be true that, had the appellant purchased its right of way with reference to its surveyed line rather than

with reference to its map and field notes—that is, had it described its right of way as so much land lying on each side of the line of its survey as marked and staked upon the ground, and taken a deed with such a description—it could properly contend that its true line was the line actually marked on the ground even though its maps and field notes showed a different line. But it did not purchase with reference to such a description. It purchased with reference to its maps and field notes without regard to the surveyed line—in effect, it described the land purchased by metes and bounds—and in determining its rights under its contract of purchase, it must be held to have purchased the land so described, not that actually surveyed.

It has been held, it is true, and it is perhaps the general rule, that when a railroad company in good faith surveys and locates a line of railway, and proceeds with reasonable diligence to procure a right of way thereover and to construct its road, the courts will protect its survey from the encroachments of another road. But the rule can have no application here. In so far as it is made to appear by this record, the appellant was not proceeding with the construction of its road, nor has it any intent or purpose to do so in the near future. Its survey over this line was made nearly seven years before the respondent's entry; the stakes marking the same were in part destroyed; and it was only by taking the field notes and following the line with care that these remaining stakes could be located. The appellant had, moreover, prepared and placed on the public records a map showing that its road did not trench on the ground here claimed, and we think it too much to say that the respondent, who is in good faith constructing a road, should be required to resort to condemnation proceedings and the payment of damages to the appellant before it will be permitted to continue its construction work.

The judgment is affirmed.

MOUNT, RUDKIN, and DUNBAR, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

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Statement of Case.

[No. 6912. Decided March 28, 1908.]

**LUIGI ONGARO, Respondent, v. JOHN TWOHY *et al.*,
Appellants.¹**

STATUTES—LAWS OF OTHER STATES—NECESSITY OF PLEADING. In an action by a servant for personal injuries sustained in another state, it is proper to exclude evidence of the laws of such state relating to vice principals and fellow servants, where the same were not pleaded.

MASTER AND SERVANT—FELLOW SERVANTS—POWDERMAN AND COMMON LABORER—VICE PRINCIPALS—WARNING. A foreman and "powder" man engaged in blasting and drilling operations at the top of a cut in railroad construction work are not fellow servants of one employed in the cut below as a common laborer in shoveling rock and earth into cars; and the former represent the master and are bound to give notice to laborers in places made dangerous by their work.

SAME—ASSUMPTION OF RISKS. Employees working in the proximity of blasting operations on railroad construction work do not assume the risk of the negligence of a shift boss and "powder" man in using a steel rod to tamp dynamite into a hole, where such operation was extra dangerous and likely to cause a premature explosion.

DAMAGES—PERSONAL INJURIES—MEASURE OF DAMAGES—FUTURE PAIN—INSTRUCTIONS. In an action for personal injuries it is reversible error to instruct that the plaintiff may recover for the pain and suffering "which he may suffer in the future," as the recovery must be confined to such future pain and suffering as is reasonably certain to result from the injury (DUNBAR, J., dissenting).

APPEAL AND ERROR—EXCEPTIONS—MODE OF TAKING—TRIAL. Where exceptions were dictated to the stenographer by an attorney in his place at the attorney's table, with the presiding judge upon the bench, it cannot be objected that the judge could not hear the exceptions, since it was his duty to do so.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 12, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a railway construction employee through the firing of a blast. Reversed.

¹Reported in 94 Pac. 916.

Edward J. Cannon, for appellants.

Maurice Smith and Gallagher & Thayer, for respondent.

MOUNT, J.—Action for personal injuries. The defendants appeal from a judgment for \$3,500, entered upon a verdict in favor of the plaintiff. The appellants were engaged in railroad construction work near Bonner's Ferry, Idaho. On the 8th day of December, 1905, they were constructing a deep cut, using dynamite for the purpose of blasting out the rock and earth. The respondent was employed as laborer in shoveling rock and earth into cars at the face of the work. A hole had been drilled perpendicularly from the top of the work, some seven or eight feet deep. Several sticks of dynamite had been placed in this hole by the foreman and an employee known as a "powder" man. These sticks of dynamite had become lodged in the hole, and thereupon the foreman in charge of the work directed the powder man to drive the dynamite down to the bottom of the hole. There is some dispute as to whether the foreman told the powder man to use a wooden stick or a steel drill for that work. At any rate a steel drill was used for that purpose, and no notice or warning was given to the employees who were working below in the bottom of the cut. The use of the steel drill was dangerous—almost sure to explode the dynamite. The result was that the dynamite was exploded, and a large quantity of rock and earth was blown out of the face of the work and upon the respondent, who was working below. His leg was broken and he was otherwise bruised. The negligence alleged was that the foreman caused the explosion of the dynamite without giving notice to the plaintiff, that defendants adopted a dangerous and unsafe way of tamping by using a steel rod instead of a wooden one, and that defendants failed to furnish plaintiff with a reasonable safe place to work.

At the trial the appellants offered to prove the laws of Idaho relating to vice principal and fellow servant. The court excluded this evidence; we think, correctly, because there was

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no intimation in the pleadings that appellants were relying, or intending to rely, upon the law of any other state, except the mere admission in the answer that the injury occurred in Idaho. If the appellants intended to rely upon the law of another state, both that fact and the law of such state should have been pleaded, the same as other facts. 9 Ency. Plead. & Prac. 542; *Cincinnati etc. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. 67; *In re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

Appellants argue that the questions of fellow servant, safe place, and assumption of risk were improperly submitted to the jury. We shall not attempt to follow the argument, because it seems clear to us, from an examination of the evidence, that these questions were properly for the jury. In the first place, the powder man and the shift boss, who had charge of the blasting and drilling operations, and who were claimed by appellants to have been fellow servants with the respondent, were engaged in an entirely different class of work from the respondent. They were handling an extremely dangerous agency, viz., dynamite, requiring skill and great care, while the respondent was in the cut below, engaged as a common laborer shoveling earth into cars. In the next place, it was the special duty of the shift boss and the powder man to keep the place safe so as to protect the respondent, who had no means of knowing what they were doing and no means of guarding against their acts. Under these circumstances, it seems clear that the respondent was not a fellow servant with either the shift boss or the powder man, but that these two men necessarily represented the master, and were bound to notify laborers in places made dangerous by their work. *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Cook v. Chehalis River Lumber Co.*, 48 Wash. 619, 94 Pac. 189.

It is said that the blast which caused the respondent's injury was a premature explosion which the powder man and the shift boss did not know about, and that every person working

near assumed the risk of such explosions. It is no doubt true that no one was prepared for the explosion when it occurred, but the evidence shows that a steel rod used to tamp dynamite into a hole is about as certain to cause an explosion as a lighted fuse. The shift boss and the powder man were, therefore, bound to know this fact and to notify others of the danger. They were the only persons who assumed the risk of their own careless conduct in this respect.

Upon the measure of damages, the court instructed the jury as follows:

"And if you find a verdict for the plaintiff your verdict will be in one sum such as will compensate plaintiff for the injuries which he has sustained or the pain which he has endured or pain and suffering which he may suffer in the future and for the loss of employment. You should not award him anything by way of punishment. You should not award him anything as the result of feeling or sympathy for him, but your verdict should be simply compensatory; that is, it should compensate him fairly for these various things which I have just told you."

This was the whole instruction upon this subject, and it does not appear to be modified or limited by any other instruction. Under this instruction the jury were authorized to compensate the plaintiff "for pain and suffering which he may endure in the future." This is not the rule. The respondent is entitled to recover for such future pain and suffering as are reasonably certain to result from the injury. *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. 128. "Not such as may result or are merely probable or likely." *Chicago etc. R. Co. v. Newsome*, 154 Fed. 665; *Schwend v. St. Louis Transit Co.*, 105 Mo. App. 534, 80 S. W. 40; *Ford v. Des Moines*, 106 Iowa 94, 75 N. W. 630; *Chicago etc. R. Co. v. Bailey*, 9 Kan. App. 207, 59 Pac. 659; *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 183, 61 N. W. 771; *Chicago etc. R. Co. v. McDowell*, 66 Neb. 170, 92 N. W. 121; *McBride v. St. Paul City R. Co.*, 72 Minn. 291, 75 N. W. 231; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 21 N. W. 524, 50

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Am. Rep. 154; *Kucera v. Merrill Lumber Co.*, 91 Wis. 637, 65 N. W. 374. See, also, *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869.

It is true we sustained a somewhat similar instruction in the *Kirkland* case, *supra*, but the instruction there contained words which required more than a possibility of future pain and suffering. The same is also true in the case of *Cameron v. Union Trunk Line*, and *Gallamore v. Olympia, supra*. The correct rule was recognized in each of these cases, but we held that the modifying language of the instructions in those cases was sufficient to bring the instructions within the rule. But in the case at bar the language used leaves it to the jury to award damages upon a mere possibility of future pain and suffering, which is clearly erroneous.

It is contended by the respondent that no sufficient exception was taken to the instructions, because the exceptions were dictated to the stenographer and not to the judge. The record shows that the exceptions were taken as follows:

"The exceptions of both parties were taken in open court by the respective attorneys immediately after the jury had retired, in the following manner: Defendant's attorney first dictated his exceptions in a low tone of voice to the stenographer in attendance, whereupon the plaintiff's attorney did likewise. The respective attorneys were in their place at the attorneys' table and the presiding judge was upon the bench throughout the dictation, though he did not and could not from his place hear the exceptions so dictated."

It was the duty of the court to hear the exceptions. If he did not hear and understand the record which was being made by the attorneys in his presence in open court, he should have done so, and neither the court nor counsel can be heard to say otherwise at this time. The exceptions were therefore sufficient.

Other errors claimed by the appellant will probably not occur again and are therefore not considered. For the error

in the instruction above set out, the judgment is reversed, and the cause remanded for a new trial.

CROW, FULLERTON, and ROOT, JJ., concur.

DUNBAR, J. (dissenting)—I dissent. I do not think the instruction complained of will reasonably bear the narrow construction given it by the majority. There is nothing in the language to indicate to the jury that it should determine the question of future suffering under any different rule than that which would be applied in determining any other question in the case.

[No. 7087. Decided March 28, 1908.]

EUGENE JOHNSON, *by His Guardian, etc., Respondent*, v.
GREAT NORTHERN RAILWAY COMPANY *et al., Appellants.*¹

RAILROADS—OPERATION—INJURY TO TRESPASSER ON TRAIN—CARE AS TO LICENSEE—NOTICE—QUESTION FOR JURY. There is no liability for injuries sustained while riding on a switching train without the knowledge of the company or its employees, and a verdict should be directed for the defendants, where it appears from plaintiff's evidence that, after riding a short distance by permission of, and with, the rear brakeman on a flat car, the plaintiff left the train at a point where it had stopped, and walked forward and climbed on a load of lumber near the middle of the train with boys who were hiding from the train crew, and fell upon attempting to pass over the tops of the cars, none of the train crew having any knowledge that the boys were on the train; since even if plaintiff was a licensee, the company's duty to exercise reasonable care was not violated.

TRIAL—QUESTION FOR JURY. Where the facts are admitted and show no negligence on the part of the defendant, the question is one of law for the court, and a verdict should be directed.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 29, 1907, upon the

¹Reported in 94 Pac. 895.

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verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor, a trespasser, while riding on a freight train. Reversed.

L. C. Gilman, R. C. Saunders, and M. J. Gordon, for appellant Great Northern Railway Company.

Ballinger, Ronald, Battle & Tennant, for appellants O'Day et al.

John E. Humphries and George B. Cole, for respondent.

MOUNT, J.—Action for personal injuries. Plaintiff recovered a verdict and judgment for \$10,000. Defendants have appealed.

At the trial of the cause the defendants moved for a directed verdict. Their motion was denied and they stood upon the evidence on the part of the plaintiff. After verdict the defendants moved for a judgment notwithstanding the verdict. This motion was denied, and a judgment was entered upon the verdict. The facts are therefore undisputed, and are as follows: On the 1st day of June, 1906, the respondent, Eugene Johnson, was fourteen years and nine months of age. He weighed from ninety-eight to one hundred pounds. He resided with his parents in the city of Everett. His father was an architect and his home surroundings were comfortable. He began going to school at the age of six years, and from that time to the date above stated had attended with about the same regularity as other boys of his age; had kept up with his classes, and passed his examinations at the ends of the years. During vacation periods he had worked at a drug store off and on for the period of two or three years, and had worked as usher at the theater a few times. The residence of his parents was situated about two blocks from the railroad tracks, and he was accustomed to seeing trains.

On the date stated the appellant the Great Northern Railway Company was operating a switching train consisting of about forty cars which were being moved out through its

yards in Everett to a smelter, a distance of two or three miles. This train was in charge of the appellant O'Day, who was a switch foreman acting as conductor. The appellant Kassebaum was employed thereon as rear brakeman. His duties required him to be on, and look out for, the rear end of the train. There was another brakeman by the name of Lynch, whose duties required him to be on the front end of the train. He was at his post. The proper and usual place for the conductor was on the foot board of the engine. He was at his post at the time referred to. The train was a loaded train consisting of box cars, flat cars, and other cars. It had no caboose or passenger cars attached and was not designed to carry passengers. The rear car was a flat car. Respondent called it a "gondola" car. While the train was moving through the yards at Everett, the respondent, Eugene Johnson, in company with a boy about his own age, approached the brakeman Kassebaum who was sitting on the rear of the rear car, and asked permission to ride. Kassebaum nodded his head, which the boys took to be an affirmative answer, and they caught the train and climbed on to the car with Kassebaum. They rode with him about a mile to a point known as "Blackman's mill," where the boys got off the car onto the ground and proceeded to walk along the track toward the front end of the train. When about the middle of the train, they discovered four other boys on a load of lumber. They then again climbed onto the train and joined the other boys, who were hiding from the train crew. There they played a game of cards until after the train had started and until the train ran within a couple of blocks of the smelter yards where they knew it was going to stop. The respondent then, in company with the other boys, climbed onto the top of the box cars and walked forward thereon, looking for a place to alight. In going forward over the top of the cars, they came to a car loaded with lumber. Two or three of the boys jumped onto this car of lumber and respondent attempted to do the same, but in some manner slipped and fell between the cars. The

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train was moving about four miles per hour, and the wheels of one of the cars ran over and crushed both his feet.

It was not shown that the brakeman Kassebaum, or any of the train crew, knew that the boys were on the train after it left Blackman's mill, or that the boys intended to go any further. The boys did not see any of the crew, and none of the crew saw the boys after the train left the mill and until after the accident. All the boys except the respondent knew that they were not allowed on the train. It does not appear that O'Day, the conductor, had any knowledge whatever that the boys were on the train, and it does not appear that Kassebaum knew where the boys were after they got off the train at Blackman's mill. The point of the accident was about the middle of the train, twenty car lengths from the front and rear. There was no improper handling of the train, and no negligence of any kind, except the fact that the respondent was permitted or invited to ride on the rear of the car with the brakeman as above stated. Respondent had never ridden on a freight train before, did not know it was dangerous to walk on top of the cars, or to jump from one car to the other when the train was in motion. The distance the respondent attempted to jump, from the top of the box car to the lumber car where the lumber was not piled evenly, was about four feet. Respondent testified that he did not know it was dangerous to attempt to jump this distance. It was not shown that the brakeman Kassebaum had permitted the boys to walk on the tops of the cars, or that he knew they intended to do so, or that he saw them. There was some evidence that he might have seen them when the train passed a curve while they were on top of the cars.

It seems quite clear from these facts that there is no evidence of negligence on the part of the defendants in this case. If the respondent was a trespasser upon the train, the appellants owed him no duty except not to wantonly or wilfully injure him. It is claimed by respondent that he was not a trespasser, because he was invited by the brakeman to ride on

the rear car. It was not shown that the brakeman had any authority to invite any person to ride on the train. On the contrary it was shown that the train was in charge of the conductor, who was upon it at his station, and that it was generally known that boys were not permitted to ride thereon. The case in this respect is similar to the case of *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955, where we held that a boy, who had been driven away and subsequently was invited into a dangerous place by persons unauthorized so to do, was still a trespasser.

But assuming for this case that the respondent here was a licensee and that the other appellants were bound by the negligence of Kassebaum, it was the duty of the appellants then to exercise reasonable care to see that respondent was not injured. *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526. This required the appellants to do no more than an ordinarily prudent person would do under the same circumstances. The boys rode with the brakeman on the rear car until they came to Blackman's mill. There the boys got off the train. They did not tell the brakeman that they intended to go further. The brakeman did not see them, and did not know that they were on the train after that time. He did not know where they were, and no other member of the train crew knew that the boys were about the train at all. Before any negligence could be charged against any of the defendants, it was necessary to show that they had notice that the boys were on the train and likely to do, or were attempting to do, what they did do. None of these facts were shown. When the boys left the train at Blackman's mill, the brakeman had a right to suppose that they would not again climb onto the cars unless something occurred to notify him otherwise. He certainly could not be held to look after their safety when he did not know, and had no reason to know, that they were on the train. It is true, the boys testified that they might have been seen by the train crew as the train passed around a curve when they were on top of the cars, but it is

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quite clear that it was then too late to have prevented the injury, even if the trainmen could be held to know it would occur. We see no evidence of negligence in the case sufficient to take it to the jury.

Counsel for respondent devote several pages of their brief to a discussion of the rule that all questions of fact should be decided by the jury, etc. There can be no doubt about this rule, but in this case, as we have seen above, there is no question of fact. The facts are all admitted and, being so, show no negligence of the appellants. Where there is no evidence of a controlling fact, the question is one of law for the court. The negligence in this case is wholly that of the respondent. The trial court should therefore have directed a judgment for the appellant.

The judgment must be reversed and the cause ordered dismissed.

HADLEY, C. J., CROW, FULLERTON, DUNBAR, Root, and RUDKIN, JJ., concur.

[No. 7102. Decided March 28, 1908.]

MARY JANE HAYDEN, *Appellant*, v. REINHOLD ZERBST *et al.*,
*Respondents.*¹

HUSBAND AND WIFE—CONVEYANCES BETWEEN—COMMUNITY PROPERTY—SEPARATE PROPERTY OF HUSBAND. Under Bal. Code, § 4539, providing that a deed from a husband or wife to the other shall divest the grantor of any community interest and create a separate estate in the grantees, property acquired by and in the possession of a husband becomes his separate property upon his wife's making a quitclaim deed thereof to him, although he subsequently proceeded to remove clouds from the title by purchasing tax titles and other interests, where such steps and the quitclaim deed were all parts of one transaction whereby the husband, living separate and apart from the wife, sought and claimed to acquire a separate estate.

¹Reported in 94 Pac. 909.

ESTOPPEL—FAILURE TO ASSERT TITLE—HUSBAND AND WIFE—COMMUNITY PROPERTY—SEPARATION AGREEMENT. A wife who entered into a separation agreement in 1886, whereby the community property was divided and future acquisitions were to be considered the separate estate of either husband or wife, who thence lived separate and apart, is estopped to claim an interest in lands acquired by the husband in 1892, where she then also made a quitclaim deed of the property to him, and made no claim thereto for more than fourteen years and for more than five years after her husband had sold the same to innocent purchasers.

Appeal from an order of the superior court for Clarke county, McCredie, J., entered May 14, 1907, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title to real property condemned for railway purposes. Affirmed.

McMaster & Back, for appellant.

E. M. Green, for respondents.

MOUNT, J.—The Portland and Seattle Railway Company brought an action against the appellant and the respondent Reinhold Zerbst, to condemn for railway purposes all of lot 8, in block 35, in the city of Vancouver, as platted by Esther Short. These two defendants each answered separately, Reinhold Zerbst claiming to be the owner of the whole lot, and Mary Hayden claiming an undivided one-half interest therein. Thereafter a judgment in condemnation was entered, and the lot was taken by the railway company. The damages to the owner were assessed at \$1,200, which was paid into court. Thereupon the court tried out the question of title to the lot, in order to determine the proper disposition of the \$1,200. Upon this trial the court found that Reinhold Zerbst was entitled to all the money, and judgment was entered accordingly. Mary Jane Hayden appeals from that order.

There is no dispute about the facts. They are principally of record, and are as follows: The lot in question was a part of the donation land claim of Amos Short and wife, Esther Short. In 1855 this lot was platted as a part of Vancouver

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by Esther Short. In 1859 Esther Short, by a quitclaim deed, conveyed the lot to Sumner Barker. Thereafter there were many other conveyances of portions of the Short donation claim, and in order to perfect the title, which had become quite complicated and uncertain, a committee purchased from the heirs of Esther Short all their interest in the addition, and subsequently, on May 10, 1880, this committee deeded the lot in question to six parties, one being Gay Hayden. Gay Hayden and Mary Jane Hayden, the appellant, were husband and wife from the year 1880 until May, 1902. On March 10, 1886, Gay Hayden and Mary Jane Hayden, his wife, entered into an agreement as follows:

"Whereas Gay Hayden and Mary Jane Hayden, his wife, residents of Clarke county, Washington territory, have entered into an agreement this day concerning their property in said territory, and have divided their community property and have caused to be conveyed, set over, assigned and delivered each to the other his or her allotted share of said property, to the end and with the intent that each of said parties shall hold or enjoy his or her share of said property in severalty and as separate property; now therefore, in consideration of the premises and of one dollar by each to the other paid, said Gay Hayden and Mary Jane Hayden do mutually covenant and agree, each to and with the other, that from this date henceforth each shall have, hold and enjoy in severalty, and as separate property, whatever and all lands, goods, chattels and personal property of every description, which either shall acquire, earn, or produce while they shall remain husband and wife, without any claim, interference or interruption of either by the other, and each hereby surrenders unto the other the sole, separate and absolute possession and control of all property which each of said parties has received under and by virtue of the division aforesaid. In witness whereof the said parties hereunto set their hands and seals in duplicate this 10th day of March, A. D. 1886. (Signed and witnessed.)"

This agreement was recorded in the record of deeds in the auditor's office of Clarke county, where the land was located. Thereafter Gay Hayden and Mary Jane Hayden lived sep-

arate and apart and conducted business separately. They bought and sold real estate without the other joining in the conveyances. In 1892 the other five parties who had obtained title from the heirs of Esther Short conveyed by quitclaim deed all their interest in the lot in question to Gay Hayden. Mary Jane Hayden joined in this deed to her husband. In March, 1893, Gay Hayden obtained a tax deed for this lot from the city of Vancouver, being the purchaser at a tax sale. He also in the same year obtained a tax deed from the county, being the purchaser at a county tax sale. In 1894 he also obtained a deed from the heirs of Sumner Barker, deceased. In September, 1901, Gay Hayden sold and conveyed the lot to Terrence Furey. Mary Jane Hayden did not join in this conveyance. Terrence Furey, prior to the purchase of the lot, was informed that Mary Jane Hayden was the wife of the grantor but that she had no interest in the lot. On March 8, 1906, Terrence Furey sold and conveyed the lot to Reinholt Zerbst, who at said time did not know that Gay Hayden was a married man. Gay Hayden died intestate in Clarke county in May, 1902, and his estate was probated in that county. His wife, Mary Jane Hayden, made no claim to this lot until this action was begun in October, 1906.

It is argued by the appellant that the deed of 1859, from Esther Short to Sumner Barker, conveyed a perfect title to Barker, because the lot was a part of the donation land claim of Amos and Esther Short; that this lot was a part of the half of that donation land claim which belonged to Mrs. Short, and that Gay Hayden acquired no title to the lot until the years 1893 and 1894, when he acquired the tax title and also acquired the interest of the heirs of Sumner Barker; that the title which Gay Hayden acquired prior to that time was of no validity; that the contract entered into between Gay Hayden and Mary Jane Hayden was not authorized by law, was contrary to the policy of the community property law, and void, and that the legal title of the lot in question, having been acquired by Gay Hayden after that time, was

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community property which could not be conveyed without the wife joining therein.

We need not stop to inquire into the validity of the contract of March 10, 1886, as above set out, as affecting this lot or property acquired by Gay Hayden after that date, or as to the legal effect of the deed from Esther Short to Sumner Barker. The fact is that Gay Hayden was claiming the ownership of this lot in 1892 by virtue of a deed of that date, and his wife, evidently in order to quitclaim any community interest she might have therein, joined in that deed. The statute then in force, Bal. Code, § 4539 (P. C. § 8886), provides:

"A husband may give, grant, sell, or convey directly to his wife, and a wife may give, grant, sell, or convey directly to her husband his or her community right, title, interest or estate in all or any portion of their community real property. And every deed made from husband to wife, or from wife to husband, shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property."

Under this statute Mrs. Hayden was authorized to convey her community interest in the lot to her husband, as his separate property. She intended to do so, and did. They were living separate and apart at that time, and continued thereafter to live separate and apart, and bought and sold and conveyed real estate as separate property without the other joining therein. When Gay Hayden acquired the title to this lot from the Short heirs and from the committee, he acquired an interest in the property. While the record does not disclose who was in the actual possession of the lot at that time, it follows, we think, from the facts stipulated, that Gay Hayden had possession from the time of the conveyance to him in 1892. There were still certain clouds upon the title, such as delinquent taxes and the deed to Sumner Barker. Mr. Hayden then proceeded to remove these clouds by purchases at tax sales and by purchase of the interest of the Barker heirs, and thus finally removed all clouds against his title. We think

all these steps were a part of one transaction, and that the deed from Mrs. Hayden to her husband, even though a quitclaim deed and made before he had acquired all outstanding clouds or claims, converted the lot into the separate property of her husband.

But if we were to hold that this deed from Mrs. Hayden to her husband did not have the effect to make the property separate property of the husband, we are of the opinion that the appellant is now estopped to claim that she has any interest in the lot, for the reasons, that she held out to the world by the agreement and deed before stated that the lot was the separate property of her husband; that she stood by and knew that her husband was holding and treating the property as his separate property; that he sold it and conveyed it as such to purchasers who relied upon the statements that the lot was separate property, and she made no claim otherwise until she had been made a party defendant by the railway company in an action to condemn the lot, more than five years after her husband had sold the property and fourteen years after she had by deed quitclaimed her interest to him.

For these reasons the judgment should be affirmed, and it is so ordered.

HADLEY, C. J., CROW, FULLERTON, DUNBAR, Root, and RUDKIN, JJ., concur..

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[No. 7054. Decided March 28, 1908.]

In re THIRD, FOURTH AND FIFTH AVENUES, SEATTLE.¹

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—VALIDITY—AGREEMENT EXEMPTING PROPERTY. An assessment for a local improvement made under Bal. Code, § 775, which requires that each lot shall bear its proportion of the expense according to benefits received, and § 789, requiring the jury to offset benefits against damages, is invalidated by an agreement made between the city and certain property owners whereby an agreed verdict was to be returned allowing one dollar for land taken, one dollar for damages to land not taken, and one dollar for damages by reason of change of grade, where the agreement was carried out in the assessment of benefits by the jury, which was advised that there was no contest as to the lots of such owners.

SAME—EMINENT DOMAIN—COLLATERAL ATTACK. Where property has been condemned for a local improvement, and supplementary proceedings are had for the assessment of the property benefited, objections to the confirmation of the assessment roll, on the ground that verdicts were rendered in the condemnation proceedings under unlawful agreements with property owners whereby their property was relieved from assessment, constitute a collateral attack upon the condemnation proceedings, and cannot be entertained unless the judgments therein were rendered without jurisdiction.

SAME—JURISDICTION—NECESSITY OF ORDINANCE—STATUTES—CONSTRUCTION IN OTHER STATES. Where statutes relating to local improvements are practically a reproduction of the laws of another state, the decisions of such state holding that the court is without jurisdiction of an assessment proceeding unless it is based upon a valid ordinance will be followed by the supreme court of this state, and a valid ordinance is necessary to jurisdiction.

SAME—JURISDICTION—OBJECTIONS TO AWARD—COLLATERAL ATTACK. Where an ordinance authorized a local improvement and the condemnation of property therefor, pursuant to the requirements of the law, and another ordinance authorized the city to enter into agreements with owners of certain property in effect exempting the same from assessment contrary to the requirements of the law, the two ordinances must be considered together as one, and confer no jurisdiction to enter judgments in the condemnation proceedings; hence

¹Reported in 94 Pac. 1075; 95 Pac. 862.

the judgments of condemnation are void and may be collaterally attacked by objections to the confirmation of supplementary assessment proceedings.

SAME—VALIDITY OF ASSESSMENT—CHANGE IN SCHEME—VARIANCE WITHOUT PREJUDICE. A change in the scheme for widening a street whereby the condemnation of a twelve-foot strip occupied by a valuable building is abandoned, is not a variance fatal to the proceeding, where the omission of the strip did not increase the amount of the awards or the assessments and was not detrimental to any particular property in the district or to the improvement as a whole, and no prejudice to the property rights of the objectors was shown.

SAME—TWO IMPROVEMENTS INCLUDED—ASSESSMENT. A single ordinance may provide for two improvements, one the widening of certain streets and the other a change of grade of certain streets, where both relate to a unified subject; and in such case each lot should bear its share of the resultant benefits from the improvement considered as an entirety.

SAME—DETERMINATION OF ASSESSMENT. In condemnation proceedings for widening streets under a plan to regrade the same, the commissioners in determining the assessments for benefits to lands not taken may assume that, after the condemnation award, the city will regrade the street and complete the improvement within a reasonable time.

SAME—PROPERTY LIABLE TO ASSESSMENT. The franchise and property of a street railway company in a street cannot be assessed for the improvement of the street by widening and regrading the same.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 27, 1907, confirming an assessment roll made by commissioners appointed to assess property specially benefited by local improvements, after a hearing before the court without a jury. Reversed.

Harold Preston, Peters & Powell, and Guie & Guie, for appellants.

F. E. Rawlings, appellant, *pro se*.

Hastings & Stedman, for appellants Waring *et al.*

Scott Calhoun, for respondent.

HADLEY, C. J.—This is an appeal from the judgment of the superior court affirming an assessment roll for street im-

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provements in Seattle. The city council of Seattle passed an ordinance which provided for the widening, twelve feet on each side, of Third and Fourth avenues from Pike street to Denny way, and Fifth avenue from Westlake avenue to Denny way, and for changing the official grade of portions of said avenues and intersecting streets. Said avenues and streets run through what is known as "Denny hill," and the change of the grade involves deep cuts through the hill. The widening and regrading schemes proposed by said ordinance have become generally known as the "Denny hill regrade." For the purpose of widening the streets and to ascertain the damages to adjacent property, a condemnation proceeding was instituted. Verdicts of the jury were returned, aggregating \$1,124,891.54. Two forms of verdicts were used which may be called the "long" form and "short" form. The long form segregated the elements of the award so as to show the amounts of damages for the land taken for widening purposes, for damages to the remainder of the lots by the taking, and for damages by change of grade. The short form contained no segregation, but provided so much damages in the aggregate caused by the improvement as a whole. The improvement as a whole consisted of two parts; first, the change of width of the three avenues, and second, the change of grade of the said avenues and of the streets intersecting them. The improvement district extended from Pike street and Westlake avenue on the south to Denny way on the north, and from Second avenue on the west to the alley between Fifth and Sixth avenues on the east. Parts of the territory in the district were affected by both elements of the improvement; that is to say, at some places the avenues were widened and the grade was also changed; other parts were affected by the widening only; still other parts by the change of grade only, and remaining parts were not affected by either element. After the verdicts were returned and the city council had accepted the awards, the superior court appointed three commissioners to make an assessment of the property specially benefited. The assess-

ment roll made by the commissioners included all the property in the improvement district, with a few omissions, except those lots to whose owners verdicts for damages to the remaining parts not taken had been given. The roll also included property surrounding the improvement district. A hearing was had upon the assessment roll and the court modified the assessments in some respects. This appeal is from the court's approval of the roll as modified. Among the many appellants are owners of property within the improvement district, and also owners of other property without the district.

The principal error assigned is that the court confirmed the assessment roll and refused to set it aside entirely. The argument of appellants is directed to several points as affecting the validity of the assessment roll. The city council passed an ordinance authorizing the city officers to enter into an agreement in writing with certain owners of property situated in the improvement district whereby the property owner should receive one dollar as compensation for his land taken in widening Third avenue, and should have a verdict for one dollar for damages to the remainder by the taking, and also a verdict of one dollar for damages to the remainder by the change of grade of the streets. Such an agreement was made with certain property owners, and thereafter, in each instance, the verdict returned by the condemnation jury corresponded with the written agreement. By reason of said verdicts the lots affected by them were not included in the assessment made by the commissioners. Some of the property affected by the agreement and verdicts is very valuable. The assessment proceeding is under the act of the legislature of 1893, Bal. Code, § 775 *et seq.* (P. C. § 5050), and each lot should bear its proportion of the expense according to the benefits received. Under that law the jury in the condemnation proceeding shall ascertain the amount of damages which must be paid as a part of the assessable cost of the improvement. Section 789 (P. C. § 5063) requires that the damages to be ascertained shall be such as are over and above any local and special bene-

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fit arising from the improvement. In other words, the jury by its verdict must offset benefits against damages.

The possible effect of the verdicts returned in accordance with the aforesaid agreement is illustrated by appellants by reference to specific instances. For example, Bruce Waring, as the owner of lots 1 and 4, block 52, Denny's addition, was one who signed the agreement, and a verdict was returned in pursuance thereof, awarding him one dollar for the land taken, one dollar damage to the remainder for the taking, and one dollar to the remainder by the change of grade. Afterwards Waring for some reason moved the court to set aside the verdict, which was done, the court merely stating in its order that the verdict was entered by inadvertence. Afterwards Waring's case went to trial, and the jury returned a verdict for \$15,000 for the land taken, and no damages to the remainder either by the taking or the change of grade. The commissioners afterwards assessed the remainder of Waring's lots \$31,750. If the agreement as to Waring's property had been carried out as was done with other property, there could have been no assessment against his property, for the reason that the effect of the agreed verdict was to find that there were no benefits in excess of damages which could be assessed. By the last verdict, however, it was found that there were no damages to the remainder, and inasmuch as the damage for the part taken was \$15,000 and the benefit to the remainder was \$31,750, there was a net balance of \$16,750 assessable against the property. It is manifest that other property was relieved of the burden of the assessment to the extent of the above sum which would otherwise have been imposed if the agreement had been carried out as affecting Waring's two lots. Other similar illustrations are given by appellants, and there were about thirty lots in all covered by the agreement and the verdicts thereunder exclusive of the Waring lots.

The respondent argues that inasmuch as those verdicts were returned in due form, making no reference upon their

face to any agreement, it cannot be said that the jury did not fully deliberate upon the subject of damages and benefits without regard to any agreement. The jury were, however, advised that there was really no contest as to those lots, and that their services with respect thereto were merely formal. We think it would be doing violence to fair dealing to hold under such circumstances that it must be presumed that the jury fully considered the matter of damages independently of the agreement. The record clearly shows that the agreement was authorized by the ordinance, was made by the city's officers, and was carried out by the verdicts. It is thus manifest that the other property holders were deprived of the benefit of a jury's determination with respect to the lots covered by the agreement. Their interest in that subject is vital since it bears a direct and material relation to the extent of their own burden in the premises. The matter is of such importance that it invalidates the assessment which was afterwards made, if appellants are entitled to raise the question now.

Respondent argues that appellants' attack is a collateral one, and that they should not now be heard for that reason. If the attack is a collateral one upon a judgment entered merely erroneously, then respondent's contention should prevail. The attack was made by way of objections to the confirmation of the assessment roll. It was therefore made in the supplementary proceeding for the assessment of the property following the condemnation proceeding. While the condemnation proceeding bears a very important relation to the supplementary one, and while both relate to the one subject of the proposed improvement, yet under the statute of Illinois, which is similar to ours, it is held that the two proceedings are so far distinct that ordinarily an attack in the later proceeding, raising questions litigated in the former one, is collateral and cannot be maintained. The Illinois supreme court, however, states the rule as follows, in *Bass v. People*, 203 Ill. 206, 67 N. E. 806:

"The supplemental proceeding is collateral to the one on which the judgment of condemnation was rendered, and the

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questions involved in the original proceeding cannot be relitigated on the supplemental petition for a special assessment, but if the condemnation judgment is entered without jurisdiction, it may be collaterally attacked in the proceeding to confirm the special assessment."

Thus it will be seen that, if the condemnation judgment is entered without jurisdiction, it may be collaterally attacked in the supplementary proceeding. It is the position of the appellants that the condemnation judgment was entered without jurisdiction. Our statute being practically a reproduction of that of Illinois, we have heretofore followed the usual rule and have approved the decisions of that state in the matter of construing the statute with respect to such provisions as are similar to ours. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279. Invoking the same rule here, we find that it has been repeatedly held in Illinois that a valid ordinance of the city is essential to the validity of every special assessment for a local improvement, and that the court is without jurisdiction of an assessment proceeding based upon an invalid ordinance. *Walker v. People*, 202 Ill. 34, 66 N. E. 827; *Cass v. People ex rel. Kochersperger*, 166 Ill. 126, 46 N. E. 729; *Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. 812; *Carlyle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782.

Having reference to the above-stated rule, what do we find in the case at bar? We find an ordinance passed authorizing the improvement in ordinary terms, and also another authorizing an agreement with the owners of certain property affected as to damages, in practical effect amounting to an agreement to exempt the property from assessment for the improvement. Appellants say in their brief that the agreement ordinance was passed after the improvement ordinance. From our examination and understanding of the record, the agreement ordinance was first in point of time, and the resulting agreement actually antedated the passage of the improvement ordinance. We do not see, however, that it is material

which was first. The two related to the same subject, and were both intended to be operative. They must, therefore, be considered together as in effect one ordinance, since the terms of both were carried into effect. The condemnation proceeding was conducted on the plan outlined by the two ordinances considered together. The agreement plan was respected by the court, and the judgment of condemnation was based upon that plan. Under such circumstances the court had not jurisdiction to enter the condemnation judgment. The proceeding was based upon a plan not authorized by the law and in direct violation of the statutory requirement that a jury shall determine all the damages after considering also the benefits, thus making it impossible for the city to agree with certain property holders that their property is not benefited in excess of damages, and that it is therefore exempt from assessment. The improvement ordinance standing alone may have been sufficient upon its face to confer jurisdiction, but when carried into effect as modified by the terms of the agreement ordinance, it became void in its operation, and the court had no jurisdiction to enter the condemnation judgment based as it was upon mere agreed verdicts as to certain property, to the probable substantial prejudice of other property owners. In any event, other property holders had the right to presume that their rights in the premises would be protected by the ascertainment of damages as provided by law. In *Chicago v. Shepard*, 8 Ill. App. 602, it was held that a city cannot acquire property for the improvement by means of private contracts with the owners, as such a practice would lead inevitably to favoritism and corruption, and inasmuch as the statute has prescribed a specific manner for acquiring the property, it follows by the rules of construction that it impliedly forbids the thing being done in any other way. To the same effect see, also, *Ayer v. Chicago*, 149 Ill. 262, 37 N. E. 57. The condemnation judgment having been so entered without lawful authority, it was done without jurisdiction, and may therefore be attacked in this supplementary proceeding. The condemnation judg-

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ment being void, the assessment based thereon is also void and should have been set aside.

For the foregoing reasons the judgment will have to be reversed but, in view of future proceedings, some other questions raised by appellants may be properly passed upon at this time. They complain that the improvement ordinance authorized the condemnation of twelve feet of two fractional lots for the purpose of widening Fourth avenue; that, after the condemnation proceeding was instituted, the city council passed a resolution abandoning the plan of widening the avenue on the east side thereof at that point, and directed the corporation counsel to dismiss the proceeding as to that property, which was done. Complaint is made that, instead of Fourth avenue being widened twenty-four feet as provided by the improvement ordinance, there will be a jog on the east side of it caused by private property protruding twelve feet. It is claimed that this is a material change, and that appellants are being assessed for a different improvement from that originally authorized. It was not shown, however, that any property in the district would be less benefited by reason of the omission, or that the omission of this strip from the taking would be detrimental to any particular property in the district. It was not shown that the improvement as a whole would be affected by the omission. It did appear that the strip omitted is very valuable and that it is covered by a substantial business building five or six stories high. It cannot be claimed that the omission of the necessary increase in the amount of awards and consequent assessments, which the value of that land and building would have required if it had been taken, was an injury to appellants. The property mentioned is triangular in form and is all covered by the business block. It does not abut upon any lots in the district, but it is completely surrounded by streets. The only purpose to be served by the necessary heavy expense of cutting off a part of this property would be to secure twelve feet more in the width of Fourth avenue at that point for sidewalk purposes. Under such circumstances we think the variance is not a fatal one.

Such a variance to be fatal must go to the extent of prejudicing the property rights of the objectors. *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393.

Another point urged by appellants is that it was not lawful for the counsel to combine in one ordinance and as one improvement two improvements so different from each other as the widening feature and the change of grade feature of this ordinance. We think this contention is not well taken. The ordinance relates to a unified subject, the improvement of certain streets, and it is immaterial that such subject is capable of subdivision. Appellants argue that, in levying the assessment, no lot should be assessed for any part of the widening except such as is benefited by the widening, and then only the amount of its benefit from that source. We think each lot should bear its share of the expense to the extent of the resultant benefits received by it from the improvement considered as an entirety. The widening and also the change of grade are simply elements which enter into the reasoning by which the final result is reached when fixing the amount of benefits to each lot.

Appellants' next point is that the commissioners in making the assessments for benefits proceeded upon the assumption that the streets will be hereafter widened and graded down to the new grades, and that the abutting lots will also be graded down to the same level, thereby obliterating Denny hill. They argue that the calculation of benefits was based upon the mere probability of the future improvements being made. We think this objection is without force. Under the statutory scheme the assessments must be collected to pay the awards before the city has the right to enter into possession of the land condemned in order that it may make the necessary cuts or fills for changing the grades. As a duty following the imposition of the assessments, the city assumes the burden of causing the improvement to be made, and the property holder is entitled to have his damages and benefits estimated on the assumption that the improvement will be made, and he is also entitled to have it made within a reasonable time.

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It is next urged that the assessment is void for the reason that it appears that a street railway runs through parts of the streets to be improved, and that the property thereof was omitted from the assessment. Of the decisions of this court the case of *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, is cited upon this point. That case involved the assessment of a right of way owned and controlled by an ordinary steam railroad. Since the briefs in this case were written this court has decided the case of *Seattle v. Seattle Elec. Co.*, 48 Wash. 599, 94 Pac. 194. It was there held that a street railway is not assessable for a street improvement, and the distinction between an ordinary railroad right of way owned by the company and the mere privilege of the street railway company to occupy a street along with other travelers, is clearly shown. Street railway companies are sometimes required, as a condition for enjoying the franchise to occupy the streets, to contribute to the expense of street improvements. In that manner they sustain a contractual relation to the city, but that is altogether different from an attempt to levy and enforce an assessment *in rem* against a thing so intangible as the mere right to operate cars upon a street owned by the public. On the authority of the case last cited it is held here that the railway property was properly omitted from the assessment.

For the reasons first assigned, however, the assessment will have to be set aside because of the void judgment in the condemnation proceeding. The judgment is therefore reversed, and the cause remanded with instructions to vacate the order of confirmation and to set aside the assessment roll.

FULLERTON, MOUNT, CROW, RUDKIN, and DUNBAR, JJ., concur.

ON PETITION FOR REHEARING.

[Decided May 23, 1908.]

PER CURIAM.—The respondent, the city of Seattle, petitioned for a modification of the opinion of this court heretofore filed herein. The petition was treated as in the nature of

one for rehearing, and appellants were directed to answer it. After answers were filed, the court duly considered the matter as presented by both the petition and answers, and arrived at the conclusion that the requested modification should be granted. The chief reasons urged against it in the answers relate to the alleged inexpediency of entering the condemnation judgment upon any of the verdicts which were returned, for the reason that they were based upon values estimated at a time when property valuations were very high. Such a consideration might be urged on any appeal as a ground for vacating a judgment and retrying the whole case in the light of later developments; but it manifestly could not be so treated by the court. The objection made to the original opinion is that language employed therein has the effect to declare the entire condemnation judgment void. The following words appear in the opinion, to wit: "The condemnation judgment being void, the assessment based thereon is also void and should have been set aside." The petition asks the above to be modified so as to read as follows: "That portion of the condemnation judgment entered by reason of the so-called 'Moore agreement and ordinance,' being void, the assessment based thereon is also void and should have been set aside." The petition also asks that the closing paragraph of the opinion be modified by inserting after the word "void" in the first sentence, the words, "part of the," making the whole sentence read as follows: "For the reasons first assigned, however, the assessment will have to be set aside because of the void part of the judgment in the condemnation proceeding." It is therefore ordered that the modification of the original opinion shall be and is hereby made as above indicated.

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Statement of Case.

[No. 7144. Decided March 28, 1908.]

A. L. SPENCER, Respondent, v. TOWN OF ARLINGTON *et al.*, Appellants.¹

MUNICIPAL CORPORATIONS—DEFECTS IN STREET—EVIDENCE AS TO PLACE—QUESTION FOR JURY—IMPLIED DEDICATION. In an action for personal injuries sustained by reason of defects in a street, the evidence is sufficient to warrant the submission to the jury of an issue as to whether the defect was in a public street, where it appeared that the town officers had exercised authority over the place by placing dirt and oil thereon for highway purposes, knowing that it was and would be used for such purposes, that the public had traveled over the place for twelve years, and that the town had constructed a cross-walk over the same; since dedication and acceptance may be implied from usage, the making of repairs, and invitation.

APPEAL—ASSIGNMENT OF ERRORS—SUFFICIENCY. Error in refusing a new trial on the ground of misconduct of a party is sufficiently assigned where that was one of the grounds of the motion, the brief assigns error on overruling the motion, and a subdivision of the argument is devoted to the subject of such misconduct.

TRIAL—MISCONDUCT OF JUDGE—COMMENT ON FACTS. It is unlawful comment for the judge to state what any one with common sense must say upon an issue.

TRIAL—NEW TRIAL—MISCONDUCT OF COUNSEL. It is misconduct of the prevailing party requiring a new trial, for his counsel, in argument to the jury, to repeat a prejudicial comment on the evidence made by the judge when the jury was not present, counsel stating that the same was "said here by one who knows more about these things than I do," since the inference would carry to the jury that the judge had made such unlawful comment.

SAME—PREJUDICE—INSTRUCTIONS—CURING ERROR. Prejudice will be presumed from repeating to the jury a comment made by the judge as to what any one with common sense would say as to one of the material issues of fact, and the same would not be cured by instructions that the jury are sole judges of the fact and should disregard indications made by the court or counsel.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered August 12, 1907, upon the

¹Reported in 94 Pac. 904.

verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian through stepping into an unguarded hole in a street. Reversed.

Bell & Austin and *L. N. Jones* (*Cooley & Horan*, of counsel), for appellants.

Hulbert & Husted, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries alleged to have been received within the corporate limits of the town of Arlington. The plaintiff claims that the injuries were sustained by him as the result of stepping into a hole within the limits of one of the public highways of the town. He alleges that the hole was several feet deep, about eight inches square, and boxed with timbers; that the town left the hole open and in a dangerous condition for travelers upon the highway in that it was unprotected and unguarded, without any signal placed about it to warn persons of the danger. The Jim Creek Water, Light and Power Company, a corporation, was joined with the town as a defendant in this suit, and the plaintiff alleges that said corporation caused the hole to be made about May, 1906, and that from that time until August 21, 1906, the date of the accident to the plaintiff, both the town and said corporation suffered the hole to remain open and unprotected. The town claims that the hole was not situated upon any street or highway within the corporate limits of the municipality, but that it was located upon land of the Northern Pacific Railway Company, about twenty feet west of the west line of Third street, which land had never been dedicated as a public street. The water and light company makes the same claim, and also claims that it constructed the box or hole upon said land by permission of the railway company; that it was constructed to protect gate valves for water pipes, and that if the hole was uncovered at the time of the accident, it was but recently so, and was open without the company's knowledge. The cause was tried before a jury, and a verdict was returned in

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favor of the plaintiff against both defendants, for the sum of \$9,000. The defendants moved for a new trial, which was denied. Judgment was entered in accordance with the verdict, and the defendants have appealed.

Appellants contend that the court erred in overruling their challenge to the legal sufficiency of the evidence. They admit that the evidence bearing upon the questions of notice to each of the appellants and of contributory negligence on the part of the respondent was conflicting, although maintaining that the weight of the testimony was with the appellants. They, however, insist that the evidence did not show that the place of the injury was within the limits of a public street or highway under the jurisdiction or control of the appellant town, and furthermore, that there was no conflict in the evidence upon that subject. We think there was ample evidence upon that question for submission to the jury. Witnesses testified to acts on the part of the officers of the town, indicating the exercise of authority over the place in question as a part of a public street. Among the acts mentioned were such as hauling, placing, and leveling dirt at and about this place for use for highway purposes, and the placing of oil upon the same for the said purpose, knowing that it had been, was then being, and would thereafter be used as a public highway. It was thereafter so used, and it was testified by several witnesses that the public had traveled over the place as a public highway for twelve or fifteen years. A cross-walk was built across this territory and near the hole, and a witness testified that he constructed the walk under the immediate direction of the street commissioner of the town, and received his pay therefor from the town. It was for the jury to determine whether the place was within a public street. A dedication and acceptance may be implied from a general and long-continued use by the public as of right. Elliott, Roads and Streets (2d ed.), § 154; 2 Dillon, Mun. Corp. (4th ed.), §§ 638, 642; *Raymond v. Wichita*, 70 Kan. 523, 79 Pac. 323. Making repairs and improvements and inviting the public to travel

may be considered as evidence of the adoption of a highway by a municipality, and it may be thereby estopped to deny that the way is a public one and under its control. 5 Thompson, *Commentaries on the Law of Negligence*, § 5941. The evidence was by no means all against the theory of dedication and acceptance, as urged by appellants, but there was decided testimony as to facts tending to show that the injury occurred within a public street as tested by the authorities. It was therefore not error to overrule appellant's challenge to the sufficiency of the evidence.

It is assigned as error that the court overruled appellant's motion for a new trial. A number of objections to instructions given are mentioned and discussed. We think the instructions taken as a whole were not misleading, and that they fairly stated the law of the case. It is further contended, however, that the motion for a new trial should have been granted because of misconduct of respondent through his counsel. Respondent argues that this subject is not sufficiently assigned as error to permit of its examination in this court. The motion for a new trial expressly recited, as a ground for asking a retrial, the misconduct of the prevailing party, and the brief definitely assigns that the court erred in overruling the motion. Following all this a subdivision of the argument in the brief is expressly devoted to the subject of misconduct on the part of respondent's counsel. We therefore think the subject has been assigned as error with sufficient clearness. The circumstances which gave rise to this contention were as follows: When the court was orally ruling upon appellant's challenge to the sufficiency of the evidence, it made use of the following language:

"Was it generally considered a public highway? Well, one looking at this evidence—looking at these photographs, seeing how the buildings were built, how the crossings are, and what the city itself has done—one would be a slave to mere words, would not be considered as having ordinary common sense, I think, outside of the court room, if he did not think that was a public highway."

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It will be seen that the above was an emphatic comment upon a very material fact in the case, which was to be determined by the jury, the comment being directly adverse to the appellant's contention before the jury. The jurors were not in the presence of the court at the time the remark was made, they having withdrawn until the court should hear arguments and dispose of the challenge to the evidence. The court was careful not to make such a comment in the hearing of the jury. But while respondent's counsel was making an argument to the jury, he used the following remark: "It has been said here by one who knows more about these things than I, that no one in the exercise of common sense could look at the conditions there and say that it was not a highway." An exception was taken by appellants' counsel, which was allowed, but nothing more appears in the record as having occurred at that time. If the court had repeated its remark in the presence of the jury, it would have undoubtedly constituted reversible error. *Schneider v. Great Northern R. Co.*, 47 Wash. 45, 91 Pac. 565.

Appellants urge that the remark of counsel made it manifest to the jury that the court had used the remark, and that the view expressed thereby was that of the court. We think such must be the conclusion from the record. The counsel's manner of emphasizing the value of the knowledge of the one who had made the comment, we think, must have quickly carried to the minds of the jury the conviction that he referred to the court. To the view of no other personage connected with the trial would the jury have supposed so much importance would have been attached. In such manner the jury were informed of the expressed view of the court as to a material fact, a thing which was entirely improper for them to know. The court was blameless so far as the communication of the remark to the jury was concerned, but the fact remained that the jury, in all reasonable probability, believed that they knew what the court had said. Such a situation could hardly fail to impress the jury. In *State v. Walters*,

7 Wash. 246, 34 Pac. 938, 1098, this court said, in substance, that inasmuch as all observations as to the facts before the jury are prohibited, if any such are made the judgment will be reversed unless the appellate court can see that no prejudice resulted therefrom. In this case we are unable to see the lack of such prejudice. We think under all the circumstances, the presumption must be so strongly against respondent that the burden is placed upon him to show that no prejudice resulted. It is true the court afterwards instructed the jury generally that they were the sole judges of the facts and that they should not regard anything that counsel or the court had indicated as being the facts unless the same were shown by the testimony. But it cannot be presumed that such an instruction enabled the jury to remove from their minds the impression made upon them by what they must have supposed the court had said was an important and established fact in the case.

For the reasons last assigned the judgment is reversed, and the cause remanded with instructions to grant a new trial.

CROW, MOUNT, ROOT, and RUDKIN, JJ., concur.

DUNBAR, J. (concurring)—I concur in the result, but not in the implication that because the motion for a new trial raised the question of the misconduct on the part of the respondent, and because the brief assigned error of this court in overruling the motion for a new trial, the assignment of misconduct was sufficient.

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Citations of Counsel.

[No. 6940. Decided March 30, 1908.]

**SEQUIM BAY CANNING COMPANY, Appellant, v. H. J. BUGGE
et al., Respondents.¹**

APPEAL—REVIEW—PRESUMPTIONS—DEMURRER. Where there is a demurrer upon two grounds, and an order sustaining the demurrer upon one ground, it will be presumed that it was overruled as to the other ground stated.

TRESPASS—TIDE LANDS—PARTIES. The state is not a necessary party defendant to an action by a lessee of state lands for a trespass thereon.

PUBLIC LANDS—TIDE LANDS—TITLE TO CLAMS. Clams imbedded in tide lands leased by the state belong to the lessee of the land.

SAME—POWER TO SELL TIDE LANDS. The state has power to dispose of and invest private persons with the ownership of tide lands, subject only to the paramount right of navigation and the uses of commerce.

SAME—RIGHTS OF LESSEE—TRESPASS. The lessee of tide lands under a regular lease from the state is entitled to the possession and control of the land thereof, and a third person digging clams thereon at low tide is a trespasser.

INJUNCTION—AGAINST TRESPASS—ADEQUACY OF DAMAGES. The lessee of state tide lands may maintain an action to enjoin continuing trespasses by persons who go thereon at low tide to dig clams and destroy the clam beds, a judgment for damages not affording adequate compensation.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered May 20, 1907, upon sustaining a demurrer to the complaint, dismissing an action to enjoin a trespass upon tide lands leased from the state. Reversed.

Trumbull & Trumbull, for appellant.

J. E. Cochran and Guie & Guie, for respondents, to the right of the public to take clams, oysters or shell and other fish, between the low and high tide marks, regardless of the ownership of the land, cited, among other authorities:

¹Reported in 94 Pac. 922.

Brown v. Lakeman, 15 Pick. 151; *Lakeman v. Butler*, 17 Pick. 436, 28 Am. Dec. 311; *Lakeman v. Burnham*, 7 Gray 437; *Parker v. Cutler Milldam Co.*, 20 Maine 353, 37 Am. Dec. 56; *Lincoln v. Davis*, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116; *Willow River Club v. Wade*, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; *Brown v. De Groff*, 50 N. J. L. 409, 14 Atl. 219, 7 Am. St. 794; Gould, Waters, §§ 55, 62; *Proctor v. Wells*, 103 Mass. 216; *Arnold v. Mundy*, 1 Halstead 1, 10 Am. Dec. 356; *Coolidge v. Williams*, 4 Mass. 140; *Commonwealth v. Bailey*, 18 Allen 541; *Lowndes v. Dicker-son*, 34 Barb. 586. If oysters or clams exist in their native state on a piece of ground, a person cannot deprive the public of the right to take them by depositing others in the same place. *Decker v. Fisher*, 4 Barb. 592; *Fleet v. Hegeman*, 14 Wend. 42; 2 Blackstone, § 9; Angell, Tide Waters (2d ed.), §§ 158, 159; *Shepard v. Leverton*, 2 N. J. L. 369. So far as the public right is concerned there is no difference between the shore of tidal waters and the tidal waters themselves. Coulson, Waters, 14; Hall, Rights in the Sea Shores (2d ed.), 174; *Peck v. Lockwood*, 5 Day (Conn.) 22; *Common-wealth v. Alger*, 7 Cush. 53.

HADLEY, C. J.—This is an action to enjoin the defendants from continuing what is alleged to be a trespass upon tide lands held by the plaintiff under leases of the state of Washington, the alleged trespass being for the purpose of digging and removing clams from the land. As the cause was determined in the trial court upon a demurrer to the complaint, the averments of the latter must, therefore, for the purposes of this appeal, be considered as the facts in the case. Such facts are as follows: The tide lands were leased from the state by George Davis, James Dick, and Frank Fisher. The purpose of leasing the lands was for the cultivation and taking of clams from the same by way of providing for the establishment of a cannery for the canning of clams and clam nectar. In furtherance of said project said lessees and their

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associates have incorporated as the Sequim Bay Canning Company, the plaintiff herein, and have assigned to the plaintiff the several leases issued to them by the state. The only value of the lands is for the cultivation, propagation, and digging of clams, and for that purpose they are very valuable. The plaintiff and its assignors, for the purpose of increasing the productiveness of the clam beds on said lands and for the purpose of improving the quality of the clams thereon, have from time to time since they leased the lands planted eastern clams thereon. The defendants Bugge and Sullivan, are operating a clam cannery in the neighborhood of the said lands, and have conspired together to dig clams on the lands of the plaintiff, and to that end they have induced, persuaded, and hired the other defendants, who are Indians, to enter upon the said lands and to dig and take therefrom large quantities of clams, which they have taken and are taking without plaintiff's consent, and the same are being canned in the said cannery operated by the defendants Bugge and Sullivan.

On or about the 15th day of December, 1906, the assignors of the plaintiff posted written notices on the lands that clam digging was forbidden thereon, that eastern clams for breeding purposes had been planted there, and that all persons were prohibited from disturbing said planted clams or digging others. They also personally notified the defendants to cease trespassing on the lands and to cease digging and removing clams. Notwithstanding said notices, the defendants continued to trespass on the lands and to dig and remove clams in large quantities under the direction and at the instigation of said Bugge and Sullivan. On the 29th day of December, 1906, the plaintiff, through its officers, again notified the defendants at their said cannery to cease trespassing and digging said clams. Thereupon the defendant Sullivan ordered the plaintiff's officers out of the cannery, and threatened to shoot them and to do violence upon them if they interfered with the digging of said clams, and refused to stop digging and canning them. He also advised the said Indians

to continue digging, and the Indians have, at the request of Sullivan and Bugge, continued to dig clams from said lands and to destroy the eastern clams planted as aforesaid. Unless prevented by the court, they will continue such trespass and destruction, thereby destroying the value of the lands and the leases of the plaintiff, ruining its business, and causing irreparable damage which cannot be compensated in money. To the complaint stating the above as facts, the defendants demurred on two grounds: (1) that there is a defect of parties defendant, in that the state of Washington is a necessary party defendant; (2) that the facts stated are not sufficient to constitute a cause of action upon which to base injunctive relief. The demurrer was sustained on the last-named ground, and the plaintiff, having elected to stand upon its complaint, declined to plead further. Thereupon judgment was entered dismissing the action, and the plaintiff has appealed.

Presumably the court overruled the demurrer on the first ground stated, viz., that there is a defect of parties defendant. Such a presumption may well be indulged, inasmuch as the order upon the demurrer specifies the other ground as the basis for the ruling and says nothing about the matter of defect of parties. In any event the demurrer as to defect of parties should have been overruled. The state, under the averments of the complaint, is in no sense a necessary party. It leased the tide lands in question to appellant's assignors, and placed them in possession and control. The possession and control have, for the time being, passed to the plaintiff as the assignee of the lessees. The trespass upon that possession by mere wrongdoers may be redressed without necessarily impleading the state, which is in no sense a party to the trespass or to the immediate possession which has been disturbed.

Referring now to the other ground of demurrer, we are advised by respondents' brief that it was the view of the trial court that the appellant, through the leases from the state, acquired no right to the possession of the clams superior to the rights of the public. It is contended by respondents that,

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inasmuch as the lands are at times covered by tidal waters and are uninclosed and vacant, the full common law rights of navigation and fishing remain in the waters above the lands. It is manifest that there can be no navigation except upon the waters, and at such times only as the waters engulf the soil. Ordinary fishing must also be conducted at such times, since the swimming fish can come there and exist at no other time. It is common knowledge, however, that clam digging must be done when the waters have subsided, and that the gathering and taking of clams requires a digging down into the soil, a contact with and disturbance of the land itself. Even if clams should be classified as fish under the term of "shell fish," as suggested by respondents, still they cannot be taken by the use of any methods exercised in the prosecution of the common right of fishing in the waters. Clams ordinarily live in the soil under the waters, and not within the waters. It is true they derive a part of their sustenance from the sea during the times the waters overspread the lands; but at other times they live, not merely upon, but actually within the land. They therefore, in a very material sense, belong with the land. When taken they must be wrenched from their beds, made well down in the soil itself. It must follow therefore that, if the state has authority to invest one with the private ownership of the tide lands, such investiture must carry with it the right to exercise dominion and ownership over what is upon the land, and especially over things so closely related to the soil as clams.

At this stage of our state's history it seems unnecessary to pursue any extended discussion as to the power of the state to invest private persons with the ownership of tide lands. The state asserted its original ownership when its constitution was framed. Const., art. 17, § 1. As early as 1891 this court, after careful consideration, held that the title to such lands is beyond controversy in the state, and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitu-

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tion of the state and the constitution of the United States. *Eisenbach v. Hatfield*, 2 Wash. 296, 26 Pac. 539, 12 L. R. A. 632. The doctrine of that case has never been modified by this court, and it has since been mentioned approvingly in a number of decisions. *Bowlby v. Shively*, 22 Ore. 410, 30 Pac. 154, was decided after *Eisenbach v. Hatfield*, *supra*, and the same doctrine was declared by the Oregon supreme court. That case was afterwards exhaustively reviewed by the supreme court of the United States. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. The latter court, after reviewing the laws of the different states upon the subject, said, on page 26 of the volume cited, as follows:

“The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.”

Thus the power of each state to dispose of these lands as it sees fit is recognized as the prevailing law. The opinion, on page 56, quotes with approval from the opinion of the supreme court of Oregon, as follows:

“From all this it appears that when the State of Oregon was admitted into the Union, the tide lands became its property and subject to its jurisdiction and disposal; that in the absence of legislation or usage, the common law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself; it can say to what extent it will pre-

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serve its rights of ownership in them, or confer them on others. Our state has done that by the legislation already referred to; and our courts have declared its absolute property in and dominion over the tide lands, and its right to dispose of its title in such manner as it might deem best, unaffected by any 'legal obligation to recognize the rights of either the riparian owners, or those who had occupied such tide lands,' other than it chose to resign to them, subject only to the paramount right of navigation and the uses of commerce."

Following the above quotation, the Federal supreme court makes the following statement on page 57:

"By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case."

Thus, the doctrine early announced by this court in *Eisenbach v. Hatfield* has been fully approved by the highest American authority, and there is no longer any doubt about the power of the state in the premises.

Exercising its power in the premises, this state has classified its tide lands with other public lands of the state. Bal. Code, §§ 2133, 2134 (P. C. §§ 8162, 8163). Provision is made for their sale as for other lands [Bal. Code, §§ 2177-2181 (P. C. §§ 8206, 8208)], and special authority for leasing them has been conferred by the legislature. Bal. Code, § 2180 (P. C. § 8209). The complaint in this cause says the appellant is the holder of the lands by virtue of a regular lease from the state. It follows that it is entitled to the possession and control of the lands leased, and respondents are trespassing when they go upon them and remove clams without appellant's consent. Adequate compensation for the continuing trespass and the constantly accruing damages cannot be had by a mere judgment for damages, and the complaint therefore states ground for injunctive relief. We think the complaint states a cause of action, and that it was error to sustain the demurrer.

The judgment is reversed, and the cause is remanded with instructions to overrule the demurrer to the complaint.

MOUNT, CROW, FULLERTON, RUDKIN, DUNBAR, and Root, JJ., concur.

[No. 7088. Decided March 30, 1908.]

**A. J. LARSEN *et al.*, Respondents, v. THE CITY OF
SEDRO-WOOLLEY, Appellant.¹**

MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—OBSTRUCTIONS—EVIDENCE—SUFFICIENCY. The evidence is sufficient to raise a question of fact for the jury as to the dangerous condition of a street, where it appears that the street and sidewalk were much obstructed by lumber from a mill on the abutting property and had been in that general condition for two years.

SAME—CONSTRUCTIVE NOTICE. Obstruction of a sidewalk with lumber in a general way for two years is sufficient constructive notice to the city of the dangerous condition of the street.

SAME—CONTRIBUTORY NEGLIGENCE—WALKING ON PARKING STRIP. The contributory negligence of one who trips over lumber, on the parking strip of a street, while going around a pile of lumber on the sidewalk, is a question for the jury, where the lumber prevented passage over the sidewalk; since the parking strip is part of the street and is to be kept reasonably safe.

EVIDENCE—ADMISSIONS—EFFORT TO COMPROMISE. Evidence is inadmissible of a conversation with the mayor of a town relating to an effort to compromise the plaintiff's suit against the town.

WITNESSES—REDIRECT EXAMINATION. It is not error to receive evidence concerning the amount of travel upon a street subsequent to the accident, upon redirect examination of the plaintiff as to matters opened up on cross-examination.

MUNICIPAL CORPORATIONS—STREETS—NOTICE OF DEFECT—EVIDENCE—ADMISSIBILITY. In an action for personal injuries sustained by reason of obstruction of a sidewalk that had continued for two years, it is admissible to show actual notice to the city by evidence of complaints made during such period.

DAMAGES—PHYSICAL CONDITION PRIOR TO INJURY—EVIDENCE—REMOTENESS. In an action for personal injuries, evidence of statements

¹Reported in 94 Pac. 938.

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made four years prior to the accident as to the hysterical and nervous condition of the plaintiff is inadmissible, the same being too remote.

WITNESSES — IMPEACHMENT — FOUNDATION. Evidence of prior statements of a witness are inadmissible for the purpose of impeachment where no foundation therefor was laid.

DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict for \$1,600 in favor of a previously strong woman, for an injury to the hip in the nature of a dislocation, affecting the muscles and nerves of the back, causing lameness and considerable suffering, and preventing performance of work as theretofore, is not excessive.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered June 13, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through the negligent maintenance of obstructions upon a sidewalk. Affirmed.

G. M. Davison (H. D. Cooley and Wilbra Coleman, of counsel), for appellant.

Smith & Brawley, for respondents.

HADLEY, C. J.—This is an action against the city of Sedro-Woolley to recover damages for personal injuries alleged to have been received upon a street in said city. The action was brought by A. J. Larsen and Petricka G. Larsen, as husband and wife, but the injuries were sustained by the wife, Petricka G. Larsen. They allege in their complaint that Murdock street in said city is one of the public thoroughfares thereof, and that along the west side of the street a sidewalk has been constructed as a part of the street, both sidewalk and street having at all times been generally used by the public; that one Shrewsbury was engaged in the operation of a planing and wood-working mill on land lying on the west side of said street and abutting thereon, the building in which the machinery was operated being so constructed that it was adjacent to the sidewalk; that for a period of about two years prior to the accident sustained by Mrs. Larsen, Shrewsbury, in conducting the business of the mill, was in the habit of

running lumber and timber through an opening in the wall of the building and allowing the same to drop on the sidewalk and to pile up there in such a manner as to render the street and sidewalk dangerous to public travel. It is alleged that the city not only had actual notice of this condition, but that through its proper officers it permitted the condition to continue over the protests of numerous persons, including the plaintiffs. It is averred that, as Mrs. Larsen was passing along the street, she was compelled to leave the sidewalk and pass between the lumber pile thereon and lumber piled in the street; that while she was passing between said piles of lumber, using due care and caution, she was tripped by a piece of lumber projecting from the piles and was violently thrown against the ground, whereby she received her injuries. The city denies the material allegations of the complaint, and avers contributory negligence on the part of Mrs. Larsen. The cause was tried before a jury, and a verdict was returned in favor of the plaintiffs in the sum of \$1,650. The city moved for a new trial, which was denied, and judgment was thereupon entered for the amount of the verdict. The city has appealed from the judgment.

The appellant assigns as error that the court denied its motion for nonsuit, and also its challenge to the legal sufficiency of the evidence at the close of all the testimony. It is argued that the evidence did not show any negligence on the part of appellant. The first consideration is whether there was sufficient evidence for submission to the jury bearing upon the question of the city's negligence. This involves the condition of the street at the time and place of the accident. There was ample testimony for the jury to the effect that the street and sidewalk were much obstructed by lumber at that place, and that such a condition in a general, changing way had continued for a long time, practically two years prior to the accident. The evidence as to the length of time this general condition had continued there was sufficient for submission to the jury upon the question of constructive notice

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to the city, and there was furthermore direct and positive testimony of actual notice. The street was one which the city had assumed to improve and put in condition for travel at that place. The city was, therefore, under the legal duty to see that the street was under all ordinary circumstances kept in a reasonably safe condition for public travel. The evidence was sufficient to raise the question of fact for the jury to determine whether the street was in such condition and whether there was negligence in the said particular.

It is furthermore urged that the evidence shows the injuries to be due to Mrs. Larsen's own contributory negligence. We have repeatedly held that this subject is ordinarily for the jury, and we do not think the evidence in this case is such as to take it out of the general rule. Appellant argues, however, that contributory negligence appeared as a matter of law, for the reason that Mrs. Larsen was upon the park strip of the street, between the curbing and sidewalk, when she received her injuries, it being contended in effect that she had not the right to go there. The park strip was within, and was a part of, the street. There was evidence to the effect that lumber was so placed from an opening in the wall of the mill and reaching across the entire width of the sidewalk that Mrs. Larsen could not pass along the sidewalk; that lumber was also piled upon the adjacent park strip and further out into the traveled part of the street; that there was a small space between the lumber upon the sidewalk and that upon the park strip, through which she was attempting to pass when the projecting timber caused her to fall; that to have cleared all lumber she would have been compelled to go out to or beyond the middle of the street. Under such circumstances it should not be said as a matter of law that Mrs. Larsen was guilty of contributory negligence in going upon the park strip. It is true, that strip is improved in a peculiar manner, for ornamental purposes, and it is not expected that persons will ordinarily travel upon it. But as it is a part of the highway, it cannot be said that under no circumstances do travelers have

a right to pass upon or over it. The circumstances here were such as to make it peculiarly a question for the jury whether Mrs. Larsen was negligent in passing upon the park strip in an attempt to go around the accumulated sidewalk and street obstructions.

"But if the *traveled portion* of the highway is *obstructed* or *dangerous*, making it necessary for a traveler to deviate therefrom, and in so doing he uses ordinary care, the town will be liable for damages accruing to him from an accident caused by any defect or obstruction in that portion of the highway over which he thus necessarily passes." 5 Thompson, *Commentaries on Law of Negligence*, § 6011.

See, also, *O'Laughlin v. Dubuque*, 42 Iowa 539; *Kelley v. Fond du Lac*, 31 Wis. 179; *South Omaha v. Meyers*, 3 Neb. (Unof.) 699, 92 N. W. 748; *Savage v. Bangor*, 40 Me. 176, 63 Am. Dec. 658; *Rea v. Sioux City*, 127 Iowa 615, 103 N. W. 949.

A similar question as to the use of a park strip was involved in *Fockler v. Kansas City*, 94 Mo. App. 464, 68 S. W. 363. A pile of stone had been placed upon the space left between the curbing of the street and the sidewalk, and the plaintiff in the case was injured thereby. The contention was made that the space between the sidewalk and the curbing was not intended for the use of pedestrians, and that the city therefore owed the plaintiff no duty to keep it free from dangerous obstructions. The court held that it was the duty of the city to keep all parts of the streets in reasonably safe condition for travel, and it clearly and very properly distinguished between obstructions such as trees and ornamental growth within the park space and others of an entirely different class. The court stated that such obstructions as were intended to be placed in the park space should be anticipated by the traveler, and that the city owed no duty to keep the space clear of such; but that it was otherwise with obstructions that were not intended to be placed there as a part of the plan of street improvement and maintenance. We think the reasoning was sound and sensible, and that it should be

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approved here. For the foregoing reasons the court did not err in submitting this cause to the jury.

It is contended that the court erred in refusing the appellant's offer to prove by the witness C. E. Bingham the substance of a conversation the witness had with the respondent A. J. Larsen, the husband of the injured woman. Bingham was mayor of the city at the time, and the offer stated that the conversation was with reference to a proposed compromise settlement between the respondents and the city for the injuries received by Mrs. Larsen. The offer was properly refused. It expressly appeared that the conversation related to an effort to compromise the matters involved in the suit, and under well-known rules it was improper, over objection, to disclose such a conversation to the jury.

Complaint is made that the court permitted respondent A. J. Larsen to testify concerning the amount of travel upon Murdock street subsequent to the time of the accident. This occurred during redirect examination and simply covered ground which was opened up by appellant's cross-examination of the same witness. We therefore think it was not error to overrule the objection.

It is complained that the court permitted the witnesses Hammer and Lefavor to testify of complaints made by respondents to the city council concerning the street obstructions at this mill, without fixing the time when such complaints were made. We think it clearly appeared that the complaints were made well within the time of practically two years during which the obstructed condition was continued prior to the accident to Mrs. Larsen. The only purpose of showing that complaint was made was to bring actual notice to the city, and the time was sufficiently shown for that purpose.

Appellant sought to show by the witness Mallott that about four years before the accident to Mrs. Larsen, her husband, the respondent A. J. Larsen, had made statements to the witness concerning the physical condition of Mrs. Larsen, to the

effect that she was hysterical and nervous. The court sustained an objection to this offer, and appellant urges it as error. We think it was not error, for the reason that the time was too remote to make the offered evidence properly applicable to the physical condition at the time of the injuries; and if it was intended for the purpose of impeaching Mr. Larsen, no foundation had been laid for its introduction for that purpose.

Errors are assigned upon the court's refusal to give certain requested instructions. A reading of the entire charge of the court convinces us that it was very full and comprehensive, and correctly covered every point in the case within our views of the law as above expressed. There was no prejudicial error in the instructions given or in the refusal to instruct in the form requested.

It is assigned that the damages returned by the jury are excessive, and appear to have been given under the influence of passion and prejudice. We think, under all the evidence, that neither the trial court nor this court should assume to say that the amount is excessive. There was evidence to the effect that Mrs. Larsen was, before her injuries, a very strong woman; that she was injured in the hip, somewhat in the nature of a dislocation; that the muscles and nerves of the back were also affected, and that she was lame and unable at times to move one leg forward. There was evidence of considerable suffering as the result of the injuries, and that she has been unable to pursue her work with her former success because thereof. Under such circumstances we think the court should not say that a verdict for \$1,650 was prompted by passion and prejudice.

We find no reversible error in the record, and the judgment is affirmed.

FULLERTON, CROW, MOUNT, RUDKIN, DUNBAR, and ROOT,
JJ., concur.

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Statement of Case.

[No. 6985. Decided March 30, 1908.]

JOSEPH M. VALLENTINE *et al.*, Appellants, v. THOMAS H. CARTER *et al.*, Respondents.¹

SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY—PRINCIPAL AND AGENT—AUTHORITY OF AGENT—RATIFICATION. Specific performance of a contract to convey land cannot be decreed where it appears that the same was made by agents of a nonresident owner who at the time had no authority to sell or offer the same for sale; that the terms of the contract, which was subject to the owner's approval, gave the vendees thirty days within which to close the deal after the title was made good, but this and other terms were never disclosed to the owner or approved by him; that the owner by telegraph finally authorized a sale at the price fixed, providing "\$15,000 be paid down," and executed deeds and approved securities to close the sale; that after some delay the agents of the owners notified the vendees that the sale must be closed within a certain time (less than thirty days from the time title was made good), which demand was acquiesced in by the vendees' agent at the time, but was not complied with, whereupon the deeds were returned to and destroyed by the owner, who refused to complete the sale; since the contract relied upon was never approved or ratified by the owner, who made his own contract which was terminated on failure to complete the same on time.

SAME—RATIFICATION. The fact that, after suit brought, the owner learned of the agent's contract and that \$500 earnest money had been paid to his agents, would not require him to return the money or constitute a ratification of the sale, where he had not received any of the money, and return thereof had never been demanded.

Appeal from a judgment of the superior court for King county, Yakey, J., entered May 23, 1907, upon granting a nonsuit at the close of plaintiff's case, dismissing an action for specific performance. Affirmed.

Alexander & Bundy, for appellants.

Edward Brady, for respondents.

¹Reported in 94 Pac. 932.

MOUNT, J.—This is an action for specific performance of an alleged contract. At the trial, after the plaintiffs had introduced their evidence, the trial court granted a nonsuit upon motion of the defendants, and entered a judgment of dismissal. The plaintiffs appeal.

The complaint alleges that, on May 29, 1906, the respondents were the owners of lots 5 and 8, in block 55, of C. C. Terry's addition to Seattle; that the Pioneer Rent & Collection Company, a corporation, was respondents' agent for the sale of this property; that Edwin F. James & Company, a corporation, was the agent of the appellants for the purchase of the property; that on May 29, 1906, the respondents, acting through their agent the Pioneer Rent & Collection Company, and the appellants, acting through their agent Edwin James & Company, entered into a contract, which we set out, as follows:

“Seattle, Wash., May 29, 1906.

“Received of Edwin F. James & Co., hereinafter mentioned as the purchaser, the sum of five hundred dollars (\$500) as earnest money and in part payment for the purchase of certain real estate situate in King county, state of Washington, and particularly described as follows, to-wit: Lots five (5) and eight (8) in block fifty-five (55) of C. C. Terry's First Addition to the City of Seattle, Wn., together with any and all improvements thereon, which we have this day sold to the said purchaser for the sum of thirty-five thousand dollars (\$35,000) on the following terms, to-wit: Five hundred dollars (\$500) as hereinabove received for, seventeen thousand dollars on or before June 30, 1906, six thousand five hundred dollars on or before three (3) years at 6 per cent int., payable semi-annually, on lot five (5), and eleven thousand dollars on or before three (3) years at 6 per cent int., payable semi-annually, on lot eight (8). Rents and interest on mortgages, if any, are to be apportioned from date deed is delivered. The risk of loss or damage to said premises by fire until delivery of deed is assumed by the seller to the limit only of amount allowed by the insurance companies. An abstract of title is to be furnished, and five days time allowed for the examination thereof. It is agreed that if the title to the said premises is not good, or cannot be made good within 30 days,

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or if the owner does not approve the above sale, this agreement is void, and the earnest money herein receipted for shall be refunded. But if the title to the said premises is good, and the above sale is approved by the owner, and the purchaser neglects or refuses to comply with any of the conditions of this sale within thirty days after the delivery of said abstract to said purchaser, then the earnest money herein receipted for shall be forfeited to Edwin F. James & Co., to the extent of their agreed upon commission, and the residue to the owner of the said premises, and this contract shall thereupon become null and void. The property is to be conveyed by good and sufficient deed of conveyance, free and clear of all liens and encumbrances to date hereof of every nature whatsoever. It is further agreed that Edwin F. James & Co. are to receive $2\frac{1}{2}$ per cent commission on the first \$10,000 of purchase price and $1\frac{1}{4}$ per cent commission on the balance of purchase price. Time is the essence of this contract.

"Pioneer Rent & Collection Co., Agents, by Bruskevith.

"I hereby agree to purchase said property on the above terms and pay \$35,000 as specified above.

"..... Purchaser."

The complaint further alleges that, after the making of this contract, it was amended by the agreement of the parties so as to provide that lot 5 should be conveyed to appellant Allen and lot 8 to appellant Valentine, and that the respective grantees should execute to respondents a release from any liability on account of any building on either lot overlapping the other lot. The complaint also alleges that, within the time provided by the contract, appellants made a tender to the respondents of the cash payment, notes, mortgages, and releases named; that respondents refused to convey the property, and that appellants are ready and willing to complete the contract. The answer was a general denial of all the allegations of the complaint except the ownership of the property. Proof showed the facts as follows:

The respondents have owned the two lots in question since 1897. They resided in Helena, Montana, except a part of the time when they resided in Washington, D. C. The Pioneer Rent & Collection Company, a corporation, has been their

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local agent in Seattle, caring for the property, collecting rents, and paying taxes, but with no authority to sell or offer the property for sale. W. H. Vincent was secretary, treasurer, and managing officer of that company, and Harry Bruskevith was vice president. Edwin F. James & Company, a corporation, was engaged in the real estate and brokerage business in Seattle. Edwin F. James was its president and W. R. Kelley its secretary. On or about the 26th day of May, 1906, Mr. Kelley, acting for the appellants, went to the office of the Pioneer Rent & Collection Company, and opened negotiations with Mr. Vincent for the purchase of the lots in question. As a result of these negotiations, Mr. Vincent on the same day sent the following telegram to Mr. Carter:

"Seattle, Wash., 5-26-1906.

"Hon. Thomas H. Carter, 1528 16th Street, Washington,
D. C.

"Will you accept net \$11,500 cash, \$5,000 one year,
\$5,000 two years, \$12,000 three years, on or before? De-
ferred payments 6 interest. For Seventh avenue.

"W. H. Vincent."

Mr. Carter's reply to this telegram was an inquiry as to values. On May 29, 1906, Mr. Vincent sent another telegram to Mr. Carter, as follows:

"Seattle, Washington, May 29, 1906.

"To Hon. Thos. H. Carter, Washington, D. C.

"Best offer obtainable; advise sale, providing first payment increased to fifteen thousand. W. H. Vincent."

On this same day the contract above set out was executed as therein stated, and \$500 was deposited by the Edwin F. James & Company with the Pioneer Rent & Collection Company. Two days later Mr. Carter sent the following telegram:

"May 31st, 1906.

"W. H. Vincent, Care Pioneer Rent & Collection Co., Seattle,
Washington:

"Thirty-three thousand five hundred net satisfactory, pro-
viding fifteen thousand paid down, instead of eleven thousand
five hundred. Thomas H. Carter."

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On the next day Mr. Vincent sent to Mr. Carter the following telegram:

"Seattle, Washington, June 1, 1906.

"Thos. H. Carter, Washington, D. C.

"Have accepted deposit terms your wire yesterday; send abstract.

W. H. Vincent."

Upon receipt of this telegram Mr. Vincent notified the Edwin F. James & Company that Mr. Carter had accepted the terms of the sale, and asked the names of the purchasers. The names of the appellants were given to Mr. Vincent by Mr. Kelley, who requested that lot 5 be deeded to appellant Allen and lot 8 to appellant Vallentine. Mr. Vincent thereupon prepared the deeds as requested, and also separate notes and mortgages to be executed by the grantees according to the price agreed upon for each lot. On June 4, Mr. Vincent sent a letter to Mr. Carter as follows:

"Seattle, Wash., June 4, 1906.

"Hon. T. H. Carter, Washington, D. C.

"My Dear Sir: In compliance with your telegram accepting our offer \$33,500 net to you for your Seventh avenue and Columbia st. property, I herewith enclose you two deeds, a separate deed for each of the two lots, for execution by yourself and Mrs. Carter. I am also enclosing two mortgages to be executed by the purchasers, for you approval, aggregating \$17,500 leaving amount of cash due you \$16,000 instead of \$15,000. The purchase price of this property is \$35,000; the taxes for 1905 amount to more than \$400; there are some lesser expenses attached which will reduce our commission to less than regular. I believe you have made a good sale at this time. In fact, as I wrote you about a month ago, we were holding the price at \$35,000, above the market, because we did not know if you desired to sell. I can place you where your profits will be greater from this time on than they would be by holding the property just sold.

"Yours truly,

W. H. Vincent."

With this letter were inclosed the notes and mortgages proposed to be executed by the appellants, and also deeds as prepared by Mr. Vincent for execution by Mr. Carter and wife.

This letter was the first information which Mr. Carter had of the names of the purchasers and of the fact that the lots were not to be sold to the same person. Respondents executed the deeds and approved the notes and mortgages, and inclosed the same to Mr. Vincent with the following letter:

"Washington, D. C., June 9, 1906.

"Mr. W. H. Vincent, Seattle, Washington.

"Dear Mr. Vincent: I do not know whether the buildings on either lot 5 or 8 extend over the dividing line. It may be possible that some of the improvements on lot 8 while principally on that lot, do extend to lot 5, and *vice versa*. If this be true, it will be necessary to have all these parties sign papers releasing me from all liability in the matter of possession as to such portions as may be covered by overlapping buildings. I would rather not have the trade go through than to get into conflict or litigation with either party over the possession of any portion of the property on the warranty given. Until this matter is thoroughly cleared up or signed up, if conflict exists, do not deliver the deeds.

"Yours very truly."

Upon receipt of this letter, Mr. Vincent informed Mr. James that the deal could not be closed until such releases were executed. On June 22 an abstract of title was delivered to Mr. James, who had the same brought down to date. Certain minor defects were found in the title. The Pioneer Rent & Collection Company undertook to get corrections made, and on July 6, 1906, it was stated that they were unable to get certain affidavits which Mr. James desired. Thereupon Mr. James of Edwin F. James & Company, undertook to get these affidavits himself, and succeeded in getting affidavits which he stated were acceptable to the appellants. On July 9, 1906, Mr. James informed Mr. Vincent that he could not raise all the money to close the deal, and that he was short some \$6,000, and offered to pay to Mr. Vincent a bonus of \$200 if he would raise the money. Mr. Vincent replied that he "couldn't do anything toward a temporary loan." Mr. Vincent then stated to Mr. James that, if the deal was not closed that day, the deeds would be returned to Mr. Carter.

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Mr. James responded that he would be ready to close the deal that day. The deal was not closed on that day, but on July 11, Edwin F. James & Company tendered to Mr. Vincent \$17,000 in gold, together with the notes and mortgages and the releases as required by the respondents, which notes and mortgages, etc., were duly executed by the appellants. Mr. Vincent then refused the tender upon the ground that the time had expired and that the tender was made too late. Mr. Vincent thereupon returned the deeds to Mr. Carter who, thinking that the trade was a failure because of the conditions contained in his letter of June 9, 1906, destroyed the deeds. Mr. Carter at that time had no knowledge of any written contract except what was contained in the letters and telegrams which had passed between himself and Mr. Vincent, and he did not receive any payment thereon. This action was begun on August 9, 1906.

These facts are insufficient to base specific performance upon, because they do not show that Mr. Carter authorized the contract sued upon, or that he knew anything about the terms of it until after this action was begun, except such part of it as is contained in the letters and telegrams above quoted. At the time the contract was signed, the Pioneer Rent & Collection Company was not authorized to offer the lots for sale, much less enter into a contract binding upon Mr. Carter. Mr. Carter never knew about this contract, and of course cannot be said to have ratified it. It is true that, a few days later, on May 31, 1906, when he was offered \$33,500 for the property, he wired that this amount would be "satisfactory providing \$15,000 paid down." In answer to this he was informed by Mr. Vincent: "Have accepted deposit terms your wire." This was not the contract which the two real estate firms had entered into, and it is quite evident that the Pioneer Rent & Collection Company did not desire that Mr. Carter should know the terms of that contract prior to his accepting the offer of \$33,500. The telegram of May 31 no doubt authorized the Pioneer Rent & Collection Company to close the

sale upon the offer made and accepted, but this authority was not general. It was limited to the terms of the telegram and such other powers as were necessarily implied. Among these would probably be the right to fix the time within which the sale should be consummated. It certainly did not authorize the Pioneer Rent & Collection Company to bind Mr. Carter by some other contract. The written contract sued on in the complaint and received in evidence shows that the time was limited to thirty days after the delivery of the abstract. This appears to have been signed by the Pioneer Rent & Collection Company, but it was not signed either by Edwin F. James & Company, or by the appellants for whom it is claimed Edwin F. James & Company was acting. They were therefore not bound by it. When Mr. Carter was informed who the purchasers were, he executed deeds as requested, and he approved the security for the deferred payments. But he especially enjoined on his agent not to deliver the deeds until he was relieved of certain liabilities.

Thereafter, when these conditions were complied with and the purchasers were satisfied with the title, and the Pioneer Rent & Collection Company was in possession of the deeds ready to deliver them, the purchasers were informed that the transaction must be closed on July 9, or that the deeds would be returned to Mr. Carter. No objection was made upon the ground that the time was insufficient or that the written contract gave them thirty days after the 22d day of June; but Edwin F. James & Company assented to that demand and stated that the trade would be consummated on that day, thus showing that the parties did not rely upon the written contract which had previously been agreed upon between the two real estate firms. It was not so consummated, and a tender was not made until two days later. Edwin F. James & Company was then informed that the tender was too late, and it clearly was too late, according to the evidence which was undisputed upon this point.

It is also argued that, because neither the Pioneer Rent & Collection Company nor Mr. Carter has returned the \$500 de-

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posed with the former, this shows a ratification of the original contract. It is true that, after the action was begun, Mr. Carter came on to Seattle and was then for the first time informed of the terms of the contract which the two real estate firms had entered into on May 29, 1906; and it is also true that he did not request that the money should be returned. But this fact cannot be held to be a ratification of that contract by Mr. Carter, because this action was then pending, and the right of the parties became fixed on July 9, when negotiations for the sale were terminated. It does not appear that the appellants or Edwin F. James & Company have ever demanded the return of the \$500, or that Mr. Carter received any part of it, or that the Pioneer Rent & Collection Company has ever refused to return the same. There can be no doubt of the liability of the Pioneer Rent & Collection Company to repay the deposit under the facts shown.

A careful reading of the evidence in this case convinces us that Mr. Carter was making his own contract, and that the Pioneer Rent & Collection Company had no authority to make one for him. The transaction was simply conducted through that company, with specific instructions upon each point, and without any knowledge on the part of Mr. Carter of any act not specifically authorized by him by letter or telegram. It also clearly appears that Edwin F. James & Company was fully informed of each direction to the Pioneer Rent & Collection Company by Mr. Carter, and knew the authority of that company. We are of the opinion that the trial court correctly granted the nonsuit, and the judgment is therefore affirmed.

HADLEY, C. J., DUNBAR, and CROW, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

150 WHITMAN COUNTY v. UNITED STATES FID. ETC. CO.

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[49 Wash.

[No. 6976. Decided April 1, 1908.]

WHITMAN COUNTY, *Appellant*, v. UNITED STATES FIDELITY & GUARANTY COMPANY, *Respondent*.¹

VENUE—ACTION AGAINST CORPORATION — RESIDENCE — CONSENT OF CODEFENDANT. Where an action was commenced against a corporation in the wrong county, in which it had no agent or place of business, the fact that another proper party defendant was served in another county and defaulted does not confer jurisdiction over the corporation, when it is not made to appear that the consenting co-defendant was a resident of the county in which the action was brought.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered March 18, 1907, upon overruling a demurrer to defendant's plea of want of jurisdiction, dismissing an action upon a surety bond. Affirmed.

John Pattison, for appellant.

E. K. Hanna, for respondent.

PER CURIAM.—In November, 1901, one Charles G. Raby, who was then county auditor of Whitman county, embezzled of the funds of that county some \$1,753. In November, 1904, the county instituted this action in the superior court of Whitman county against Raby and the respondent, who was the surety on Raby's official bond, to recover the amount so embezzled. At the time of commencing the action, the surety company did not have an office for the transaction of its business in Whitman county, nor did it have an officer, agent or person in that county on whom service of process could be made, its statutory agent and principal place of business being then in King county, at which place service of summons and complaint was made upon it. The record does not show Raby's place of residence further than it appears that personal service of summons and complaint was made upon

¹Reported in 94 Pac. 906.

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him in Walla Walla county. Raby made default. The surety company, in addition to an answer on the merits, set up want of jurisdiction in the court. A demurrer to the plea of want of jurisdiction was overruled, and on the refusal of the county to plead further, judgment of dismissal against it was entered. The county appeals.

Had the surety company been sued alone it is clear, on the authority of the cases of *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, and *Hammel v. Fidelity Mutual Aid Ass'n*, 42 Wash. 448, 85 Pac. 35, that no action would lie against it. It is thought, however, that, since Raby was a proper party to the action and submitted to the jurisdiction of the court, jurisdiction attached as against the surety company also. But it seems to us that this does not follow. Had it been made to appear that Whitman county was the county of Raby's residence, and that as a consequence the action was properly brought there as against him, a different question would be presented. But being brought in the wrong county as against both of the defendants, neither defendant can confer jurisdiction on the court as against the other by consenting to have the action tried in that county. In this respect the rights of the defendants are equal, and inasmuch as jurisdiction did not exist independently of Raby's consent, it was not conferred by that consent.

The judgment appealed from is affirmed.

[No. 6986. Decided April 1, 1908.]

**WILLIAM E. MCINTOSH, Respondent, v. SAW MILL PHOENIX,
Appellant.¹**

MASTER AND SERVANT—GUARDING MACHINERY—NOTICE BY SERVANT—FACTORY ACT. The failure of an employee to give notice of the unguarded condition of a saw does not, under the factory act, preclude a recovery, since the object of the notice is simply to secure an inspection thereof by the commissioner of labor.

SAME—NATURE OF “GUARD”—REQUIREMENTS OF FACTORY ACT—INSTRUCTIONS. Where an operator was injured by the cutting of his hand on a hand-fed rotary ripsaw, which was not guarded, and there was evidence that a self-feeding apparatus had previously been in use on the machine and would have avoided the danger, it is error to refuse to give an instruction that the self-feeding apparatus, which made a radical change in the operation of the saw, is not such a guard for a hand-fed saw as is contemplated by the factory act requiring saws to be guarded.

TRIAL—INSTRUCTIONS IN WRITING. The statute requiring instructions to the jury to be in writing, when so requested, is mandatory, and is not complied with by oral instructions taken down by a stenographer employed by the parties.

SAME. The proviso to laws 1903, p. 120, that injury must be shown to justify a reversal for the refusal of an instruction or ruling, has no application to the requirement that instructions shall be given in writing when so requested.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered February 11, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee while operating a ripsaw in a sawmill. Reversed.

Graves, Kizer & Graves, for appellant.

Birdseye & Smith, for respondent, to the point that in civil cases, a statute requiring instructions in writing is merely directory, cited: 11 Ency. Plead. & Prac. 255, foot note 1; *Galveston etc. R. Co. v. Dunlavy*, 56 Tex. 256; *Daly*

¹Reported in 94 Pac. 930.

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v. Bernstein, 6 N. M. 380, 28 Pac. 764. The only object of the law is to preserve the instructions. *State v. Champoux*, 33 Wash. 339, 74 Pac. 557; *State v. Preston*, 4 Idaho 215, 38 Pac. 694; *Penberthy v. Lee*, 51 Wis. 261, 8 N. W. 116. And failure to give written instructions is not ground for reversal unless prejudice is shown. 11 Ency. Plead. & Prac. pp. 256, 257; *Greathouse v. Summerfield*, 25 Ill. App. 296; *Walsh v. St. Louis Drayage Co.*, 40 Mo. App. 339; *Commonwealth v. Barry*, 11 Allen 263; *Deets v. National Bank of Pittsburg*, 57 Kan. 288, 46 Pac. 306; *Swaggart v. Territory*, 6 Okl. 344, 50 Pac. 96; *Boggs v. United States*, 10 Okl. 424, 63 Pac. 969, 65 Pac. 927; *Galveston etc. R. Co. v. Dunlavy*, *supra*; *Walton v. Wild Goose Min. & Trading Co.*, 123 Fed. 209; *Schwartzlose v. Meklitz* (Tex. Civ. App.), 81 S. W. 68; *Standard Oil Co. v. Doyle*, 118 Ky. 662, 82 S. W. 271, 111 Am. St. 331.

FULLERTON, J.—The respondent was injured while working as an employee in the appellant's sawmill, and brought this action under the factory act to recover therefor. In his complaint he laid his damages at \$2,000, and the jury returned a verdict in his favor for the full amount demanded. However, before the entry of judgment he filed a written waiver for any sum greater than \$1,900, and judgment was entered for that sum.

The respondent was injured on a rotary ripsaw. This was a 12-inch circular saw set in an iron frame in the form of a table, and so arranged that the saw projected for some two and one-half inches above its top through a slot made for that purpose. The saw was designed to rip planks lengthwise into any desired width to the limit of its capacity. To that end it had a movable fence or gauge fastened to the table to the right of the saw, which could be so adjusted as to measure the width of the strip cut off. To operate the saw the operator seized the plank to be cut, placed its end against the saw with the edge resting against the gauge, and

then pushed it against the saw until it was ripped for its entire length. At the time of the injury the respondent was ripping planks into strips of two and one-half inches in width. The particular plank he then held had been cut down almost to the required width, leaving but a narrow strip to be cut off. As the saw progressed through the board and approached the end at which the respondent held the board, it struck a knot, causing the plank to vibrate, throwing his left hand, which was then but an inch or so from the saw, against the saw, and three of his fingers were cut off.

The saw at the time was unguarded, save by a spreader placed just behind it which served the double purpose of keeping the boards from pinching the saw and preventing splinters and other waste pieces from drifting against the rear of the saw and being caught in its teeth and thrown forward towards the operator. The evidence tended to show that it was usual and customary to further guard such saws. The most common device in use being a cap or hood made so as to entirely cover the top of the saw, held in place by an adjustable arm; another was made of wood somewhat in the same shape; all, however, were designed to guard the top of the saw so that the operator's hands could not come in contact therewith. The court permitted evidence, also, that certain machines of this character were fitted with a self-feeding device by which planks were fed into the saw by corrugated rollers and clutches, doing away with the necessity of hand feeding altogether, and that this machine at one time had upon it some such device.

It was further shown that, prior to the time of injury, the appellant's mill was inspected by the commissioner of labor, who issued to the appellant a certificate showing that its mill and equipment complied with the requirements of the factory act, and that during such inspection the saw on which the respondent was injured was especially examined and approved by the inspector, and that no change had been made in its condition between the time of such inspection and approval and the time the respondent was injured.

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The respondent was 25 years old at the time of receiving his injury. He had worked for the appellant some three weeks, and had been employed in other mills in the city of Spokane. He was working on this machine by his own choosing. He was employed to work in the lumber yard, but hearing that the operator working on this machine had quit, he applied to the appellant's foreman for the place, and was assigned it. He worked on the machine for a week before he was injured, and made no complaint to the foreman or other officer of the appellant of the unguarded condition of the saw.

It is first assigned that the court erred in refusing to instruct the jury to return a verdict in favor of the appellant; the contention being that the respondent, since he failed to notify his employer of the unguarded condition of the saw, cannot recover under the factory act for any injury suffered because of its unguarded condition. But in *Campbell v. Wheelihan-Weidauer Co.*, 45 Wash. 675, 89 Pac. 161, we held that the failure to give the notice prescribed in § 6 of the factory act was not a prerequisite to the right to recover damages under the act, but that its sole purpose was to enable a workman to procure an inspection by the commissioner of labor of a supposedly defective machine which the employer neglected or refused to remedy.

The testimony relating to the self-feeding attachment was admitted by the court over the appellant's objection. At the conclusion of the evidence the appellant, in writing, requested the court to charge the jury to the effect that a self-feeding attachment to saws of this character was not such a guard as the law contemplated, and that they should eliminate from their consideration the protection that such an apparatus would have afforded the respondent, and the question whether or not he would have received the injury complained of had self-feeding apparatus been in use on the machine. The court refused to give such an instruction, and such refusal constitutes the second error assigned. We think the instruction, or

one of similar import, should have been given. The factory act did not contemplate such a radical change in the operation of machinery as the contrary of this proposition would imply. The ordinary rotary ripsaw is a hand-feeding machine, and the usual and customary way of operating it is to feed it by hand. When the law required the saw to be guarded it did not mean that this method of operating it should be abandoned and some other method adopted; it meant merely that the saw itself should have placed upon it and surrounding it such safeguards as were practical and would not seriously interfere with its operation. Moreover, a glance at the apparatus called a self-feeder, shown in the drawing introduced in evidence, shows it to be a somewhat complicated machine, having an elaborate arrangement of belts, cogwheels, pulleys and rachets, some of which are in as much need of guarding as the saw itself. This machine, we repeat, could in no sense be considered a guard such as was contemplated by the factory act, and the court should so have instructed the jury.

The appellant requested the court to charge the jury in writing, which the court refused to do because there was a stenographer present taking the evidence and proceedings of the court. The stenographer was one employed by the parties, and in *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, we held that the presence of such a stenographer did not justify a refusal to instruct in writing, and we do not feel that we ought to depart from the rule there announced. In this connection, however, it is well to notice the contention of counsel for the respondent that a refusal to charge in writing when requested is not necessarily fatal to the judgment, since the proviso to the section requires that an injury to the complaining party be shown before such a result follows. But an examination of the whole section shows conclusively that the proviso has no reference to that part of the section requiring the court to charge the jury in writing when requested. This requirement is mandatory, and error follows from a wrongful

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refusal to comply therewith. *State v. Miles*, 15 Wash. 534, 46 Pac. 1047; *State v. Mayo*, *supra*.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., Root, and Crow, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

[No. 7022. Decided April 1, 1908.]

M. A. BEEBE *et al.*, *Respondents*, v. JAMES TYRA *et al.*,
*Appellants.*¹

LANDLORD AND TENANT—LEASE—CONDITIONS—SALE OF LIQUOR—RIGHT OF SUBTENANT TO ENFORCE. A stipulation in a lease prohibiting the sale by the lessee of intoxicating liquors on the premises, and providing that the lease may be cancelled for violation of such clause, cannot be taken advantage of by a subtenant of part of the premises against the lessee and his other subsequent subtenants, where the first sublease did not provide against such sale in the other portions of the premises afterwards sublet; since the stipulation was a condition subsequent which could be waived, or only taken advantage of, by the original lessors, the objecting subtenants not being parties to the lease in question.

SAME—INJUNCTION—ESTOPPEL. A subtenant of part of leased premises is estopped to maintain a suit to enjoin the use of other portions thereof for saloon purposes, contrary to a provision running with the leased land, where the saloon was fitted up at great expense and allowed to run eleven months, during which time the saloon property changed hands several times, without any other objection than a letter, written before the saloon sublease was made, notifying the parties thereto of the stipulation in the lease prohibiting the sale of intoxicating liquors on the premises, and that the writers would hold the parties responsible for all damages if the terms of the lease were broken; since such equitable action must be seasonably commenced.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered June 25, 1907, in favor of the

¹Reported in 94 Pac. 940.

plaintiffs, after a trial on the merits before the court without a jury, enjoining the maintenance of a saloon upon premises leased in part by the plaintiffs. Reversed.

Post, Avery & Higgins and *Horace Kimball*, for appellants.
Samuel R. Stern, for respondents.

CROW, J.—This action was commenced by Mrs. M. A. Beebe and Anna E. Covington, against James Tyra and Mary Tyra, his wife, H. L. Crosby, A. P. Lorsch, —— Crocker, and Inland Brewing & Malting Company, a corporation, to enjoin the defendants from leasing or using a certain store-room for saloon purposes or the sale of intoxicating liquors. On August 18, 1903, Nelson Clark and wife, being the owners of a lot in the city of Spokane, executed to one John H. Clemmer a lease thereon for the term of ten years from January 1, 1904, which lease permitted him to erect a business block on the premises, and contained the following stipulation:

“And also in consideration of said lease, said second party hereby covenants and agrees that he will not allow or permit said premises, or any part thereof, to be used for the sale or distribution of any kind of intoxicating liquors, or for any immoral purpose at any time during the said term of lease.”

There was also included in the lease a forfeiture and reentry clause reading as follows:

“If at any time the said second party shall violate any of the conditions, terms or covenants of this lease, then this lease may, at the option of said first parties, be declared to be, and shall be, forfeited and the said first parties shall have the right to enter and take possession of said premises, all of which said premises shall thereupon then become the property of said first parties.”

Clemmer built upon the lot a three-story brick block, the ground floor being suitable for business purposes, and the two upper floors for lodging house or hotel purposes. In February, 1904, Clemmer executed to the plaintiff Mrs. M. A.

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Beebe a sublease for the two upper floors from March 1, 1904, to January 1, 1914, her lease containing the following stipulation:

"It is further understood and agreed that the party of the second part shall not knowingly rent said premises (second and third floors) for immoral purposes or for the sale of intoxicating liquors."

Plaintiff Anna E. Covington claims some interest in this sublease by assignment from Mrs. Beebe. In August, 1905, Clemmer sold and transferred all his interests in the lot, leases, and building to the defendant James Tyra, and on January 10, 1906, Nelson Clark and wife conveyed the lot to Tyra. At the time Tyra acquired these interests, he had knowledge of all covenants, conditions, and agreements contained in the lease from Clark and wife to Clemmer, and also in the sublease from Clemmer to plaintiff Beebe. Thereafter, on February 20, 1906, the defendants James Tyra and Mary Tyra, his wife, executed to the defendant corporation, Inland Brewing & Malting Company, a lease for the corner storeroom on the ground floor, for the term of two years, from March 1, 1906, and on November 23, 1906, executed to the same corporation a further lease extending its term to March 1, 1911. Neither of the two leases last mentioned contained any restrictions as to the sale of intoxicating liquors. The room was rented for saloon purposes, although the leases did not so recite. On March 1, 1906, the plaintiff Mrs. M. A. Beebe caused her attorneys to mail the following letter to the defendant James Tyra, which he received:

"Dear Sir:

"We are informed that you contemplate renting a part of your building, situated at the southwest corner of Lincoln street and First avenue, Spokane, Washington, known as 'The Lincoln,' for saloon purposes, and desire to advise you, as attorneys for Mrs. M. A. Beebe, that you will not be permitted to do so, as her lease prohibits the vending and selling of intoxicating liquors on the premises mentioned above. Mrs. M. A. Beebe will hold you liable for all damages, if the terms of the lease are broken."

On the same date she also caused her attorneys to mail the following letter to the defendant Inland Brewing & Malting Company, which it received:

"Gentlemen:

"We are informed that you are interested in placing a saloon in the building situated at the southwest corner of Lincoln street and First avenue, Spokane, Washington, known as 'The Lincoln,' and, as attorneys for Mrs. M. A. Beebe, beg to advise you that she holds a lease on a part of said building which prohibits the sale of intoxicating liquors in the above premises."

No further steps were taken by either of the plaintiffs to prevent the use of the storeroom for the sale of intoxicating liquors until the commencement of this action in March, 1907. The Inland Brewing & Malting Company, by its agents and sublessees, took possession of the storeroom, and without delay proceeded to equip it at heavy expense with fixtures and furniture suitable for a saloon business, which they continuously conducted for eleven months, when they were enjoined in this action. A temporary restraining order was first granted, and on the final trial a decree was entered permanently enjoining the defendants from conducting a saloon or selling intoxicating liquors in the storeroom during plaintiff's tenancy. The defendants have appealed.

The assignments of error present the single question whether the respondents are entitled to the injunction. They alleged and proved that the respondent Beebe knew Clemmer could not permit the sale of intoxicating liquors in any portion of the building, and that in leasing the two upper floors she relied upon that fact. She did not demand or secure from Clemmer any covenant or stipulation in her sublease that no liquors should be sold in other portions of the building not to be occupied by her. This action is now prosecuted by her and the respondent Covington to prevent the sale of intoxicating liquors, or the running of a saloon in the storeroom not covered by the sublease to Mrs. Beebe, but which is immediately below the rooms leased to her and in which she and

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the respondent Covington are living and conducting a lodging house. There is no contract of any kind between the respondents, or either of them, on the one part, and the appellants, or any of them, on the other part.

It is apparent that, if respondents are entitled to any equitable relief, they must predicate their action therefor upon the stipulations of the lease from the Clarks to Clemmer, there being no conditions or covenants in the Beebe sublease prohibiting the sale of intoxicating liquors in rooms on the ground floor. We fail to see how the respondents can maintain such an action upon the Clark lease to which they are not parties. The stipulation in the Clark lease prohibiting any sale of intoxicating liquors in the building to be erected by Clemmer is not a covenant which can be enforced against the assignees of Clark and wife by parties occupying the position and contractual relations of respondents. In fact, the stipulation is not a mere covenant. It is a condition subsequent inserted in the lease for the personal benefit and protection of Clark and wife, which they could waive or, in the event of its breach, could enforce at their option, by forfeiture of the tenancy and action of unlawful detainer, or by an action in equity, or by an action at law for damages. Respondents were not parties to the original lease which contained the condition subsequent upon the performance of which Clemmer's term depended. The condition was not inserted for their benefit. No one can sue upon a covenant except the covenantee, the assignee of the covenantee, or some person for whose benefit the covenant was made. The Clarks were the covenantees. The respondents never made any contract with them, nor did they afterwards become their assignees. The entire title and interest of Clark and wife was sold and transferred to the appellants James Tyra and wife, who thereupon became their sole assignees.

There are cases holding that, when an owner subdivides a tract of land and adopts a general plan for its improvement, such as building houses of a certain quality or size, or for cer-

tain uses, and to carry out such purpose inserts restrictions in his conveyances for the various subdivided tracts, such restrictions are for the benefit of the whole tract, and that the owners of any part thereof who acquired their interests from the original common grantor are entitled to an equitable action against other owners who have acquired like interests, to prevent any violation of the covenant or restriction. These cases hold that the covenant or restriction was for the benefit of each and all of the respective succeeding owners, and the authorities cited by the respondents to sustain their right to an injunction are cases of this character. There is manifestly no analogy between them and the cause now before us. The Clarks, in a single instrument, leased the entire property to Clemmer. There is no showing or evidence that they owned or retained other property in the same locality which respondents thereafter leased, or upon which there was any restriction as to the sale of intoxicating liquors. It is manifest, from the surrounding circumstances and the wording of the original Clark lease, that the lessors' only intention was to require an agreement from Clemmer for their personal protection and benefit, which they might at their option enforce or waive. Had the respondents desired to prevent the sale of intoxicating liquors in the storeroom on the ground floor, they should have taken the precaution to provide against it in their lease from Clemmer. Had they done this they would be entitled to a remedy the nature of which we are not now called upon to determine. Having failed to do so, they are without remedy.

Were it conceded, however, that the stipulation in the lease from Clark and wife was a covenant running with the land, the breach of which could be enjoined by the respondents as sublessees of only a portion of the premises, yet we think they are by their own conduct estopped from now seeking such equitable remedy. The appellants, by their answer, have pleaded such estoppel. The evidence shows that Tyra and wife first leased to the Inland Brewing & Malting Com-

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pany on February 20, 1906; that the respondent Beebe had actual knowledge of such lease and the intended use of the storeroom; that she lived in rooms on the second floor; that the Inland Brewing & Malting Company at various times sublet to three different parties; that she knew the Inland Brewing & Malting Company was installing expensive furniture, fixtures, and equipment suitable only for a saloon; that after the saloon had been running without interruption for more than seven months, the appellants Tyra and wife extended the term of the Inland Brewing & Malting Company until March 1, 1911; that the saloon was permitted to run for nearly a year without interruption, and that, prior to the commencement of this action, no steps were taken by the respondents to prevent its installation or running, other than the mailing of the two letters above mentioned. Other acts of estoppel were pleaded and proven. If the respondents were entitled to enjoin the running of the saloon and the sale of intoxicating liquors, it was their duty to proceed promptly. Their failure must now be construed as a waiver of their right to do so. *Hall v. Wesser*, 7 Mo. App. 56; *Roper v. Williams*, 12 Eng. Ch. 18.

In *Whitney v. Union R. Co.*, 11 Gray 359, 71 Am. Dec. 715, 720, Bigelow, J., said:

"But it is very clear that a suit in equity to compel a compliance with such stipulations concerning the use of property must be seasonably commenced, before the persons in possession of the estate have expended money, or incurred liabilities in erecting buildings or other structures on the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights, and thereby inflict loss and damage on parties acting in good faith. In such cases a prompt assertion of right is essential to a just claim for relief in equity."

The mailing of the letters to the appellants Tyra and Inland Brewing & Malting Company was not such an action upon the part of respondents as would entitle them to a delay

of nearly twelve months before demanding an injunction. The Inland Brewing & Malting Company first placed one party in charge of the saloon business, who afterwards sold his interests to a second party, who in turn sold to a third party. The second and third parties, even though the terms of all the leases were known to them, must have concluded upon seeing the business in progress and uninterrupted that respondents' objections had been waived, and that they were entitled to act upon such conclusion.

The trial court erred in granting the temporary restraining order, and also in granting the permanent injunction. The judgment is reversed, and the cause remanded with instructions to dissolve the injunction and dismiss the action.

HADLEY, C. J. and MOUNT, J., concur.

FULLERTON, J.—I concur in the judgment on the first ground stated.

DUNBAR and RUDKIN, JJ., took no part.

[Nos. 7079-7082. Decided April 1, 1908.]

J. F. BLEAKLEY, *Appellant*, v. ALGERNON H. WILCOX *et al.*,
*Respondents.*¹

COSTS—ON APPEAL—DISSMISSAL OF APPEAL. After appellant has moved to dismiss his appeal, the respondents cannot move to dismiss the appeal and recover costs of such motion, although they ask affirmance of the judgment.

Rehearing of an order dismissing an appeal from a judgment of the superior court for King county, Griffin, J., entered April 5, 1907. Modified as to costs.

P. D. Hughes and Fenley Bryan, for appellant.

F. E. Knowles, for respondents.

¹Reported in 94 Pac. 903.

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Opinion Per Root, J.

Root, J.—The same questions are involved in all of the above entitled cases, and may be disposed of in one opinion. On the 4th of November, 1907, appellant served upon respondents a motion to dismiss his appeal, and also a notice that the same would be called to the attention of the court on the 15th day of November. Said motion was filed with the clerk of this court November 9. On November 12, respondents filed a motion herein to dismiss said appeal. It does not appear when this motion was served upon appellant, but it was apparently so served on the 6th day of November. Respondents admit that their motion was not served upon appellant until after appellant's motion to dismiss the appeal was served upon them. Respondents did not give the necessary notice required to bring a motion on for hearing, but claim that attorneys for the appellant agreed that both motions might be heard at the same time. Appellant's attorneys admit that they agreed to make no objections to this. Upon the day the motion was to be heard, appellant's attorneys, on account of delay of a railway train, were unable to be present in court. An argument was made by one of respondents' attorneys, and their motion to dismiss was granted with costs. Appellant filed a petition for rehearing, and subsequently this court called for an answer to said petition, and an answer thereto was made by respondents. A rehearing was granted, and we are now called upon to pass upon the merits of the controversy.

Respondents, while admitting that appellant interposed his motion to dismiss his own appeal before respondents' motion was made, nevertheless claim that their motion embraced more than appellant's motion, in that they asked not only to have the appeal dismissed but to have the judgment of the lower court affirmed, and that for this reason they were entitled to have their motion granted and costs allowed. We are unable to agree with this contention. Appellant doubtless has the right to dismiss his appeal without costs whenever he chooses so to do, if there be not already served or filed a motion by

the respondents to dismiss such appeal. After the interposition by appellant of such a motion, to allow the respondents to prosecute a motion to dismiss and affirm the judgment and recover costs in this court upon such dismissal would be to indulge a practice which we think is not authorized by the statute nor in consonance with justice or sound public policy. The law does not favor the prolongation of litigation, nor the incurring of unnecessary expense. That part of the order allowing costs to respondents will be vacated.

HADLEY, C. J., FULLERTON, and Crow, JJ., concur.

[No. 7162. Decided April 1, 1908.]

JOHN PITMAN, *Respondent*, v. WILLIAM P. ERSKINE,
*Appellant.*¹

SALES—RESCISSON BY VENDEE—MISREPRESENTATIONS. An action for rescission of a sale of personal property constituting a restaurant outfit may be based upon misrepresentations by the vendor as to the amount of indebtedness outstanding against the property, within the knowledge of the vendor and unknown to the vendee, and which induced the vendee to make the purchase.

SAME—EVIDENCE—PAROL—To VARY WRITTEN CONTRACT. In an action for the rescission of a written contract for the sale of personal property, on the ground of misrepresentations of the vendor as to the amount of indebtedness outstanding against the property, it is not error to exclude evidence to show that the vendee was requested, and declined, to investigate as to the amounts due, where the effect of the evidence would have been to vary the terms of the written contract.

Appeal from a judgment of the superior court for King county, Griffin, J., entered September 28, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to rescind a contract of sale. Affirmed.

¹Reported in 94 Pac. 921.

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Opinion Per Root, J.

H. A. P. Myers, for appellant.*Shank & Smith*, for respondent.

Root, J.—Plaintiff brought this action to rescind a sale of personal property consisting of the furniture and accessories of and for a restaurant. From a judgment and decree in plaintiff's favor, defendant appeals.

The purchase price of the restaurant was \$1,600, of which respondent paid \$500 in cash, assumed a debt of \$284 due the Grote-Rankin Company, and gave his notes for the balance, \$816. Respondent took immediate possession. The Grote-Rankin indebtedness was to be paid at the rate of \$50 per month. The complaint, after setting forth the terms of the sale, contained the following allegations:

"(2) That the said sale was made upon the representations made by defendant that the entire outfit of said restaurant was free and clear of all liens and incumbrances excepting the above mentioned bill due the Grote-Rankin Company.

"(3) That said representations were false, in that a large portion of said outfit had been conditionally sold to persons through whom the defendant claimed by Grote-Rankin Company; and that there was yet unpaid upon said conditional sale the sum of three hundred and thirty-four and 54-100 dollars (\$334.54), and that the said sum was payable at the rate of one hundred dollars (\$100) per month. That the cash register in said outfit had also been conditionally sold and had not yet been paid for, and other portions of said outfit had been conditionally sold by other parties to this plaintiff yet unknown, and there are bills still due against the said property in amounts unknown by this plaintiff, and all of said sums are valid claims against the said property.

"(4) That the plaintiff is unable to pay the said sum of \$100 per month to Grote-Rankin Company, and that said company is now threatening and will take possession of the said portion of said outfit which was conditionally sold by them, and the defendant knew at the time of the plaintiff's purchase that the plaintiff would not be able to pay said sum of \$100 per month, and the plaintiff would not have made said purchase if he had known of the true state of affairs, but he made said purchase relying upon said representations

of defendant, and relying upon the warranty contained in said bill of sale.

"(5) That the plaintiff did not learn of the true state of affairs until the 10th day of May, 1907, and thereupon immediately tendered back to the defendant the said restaurant outfit, and demanded of the defendant the return of said sum of \$500 and the said notes, but the defendant refused to return the said sum of \$500 and said notes; and the plaintiff hereby tenders back to the defendant the said restaurant outfit."

At the time of the sale by appellant to respondent, the former gave the latter an affidavit setting forth that there were no bills unpaid, this affidavit being given apparently in compliance with the statute as to "sales in bulk." The bill of sale warranted the title to said goods except as to the Grote-Rankin indebtedness of the \$284, which was stated as being payable at the rate of \$50 per month.

Appellant urges that the complaint does not state facts sufficient to constitute a cause of action, and anyhow not a cause for equitable relief, in that the misrepresentations made were not sufficient to have misled the respondent, and in that the respondent should have demanded that appellant pay the excess indebtedness and adjust the matter in regard to the payments. We think, however, that the complaint was sufficient; and are also of the opinion that the evidence sustains the judgment and decree. Numerous cases are cited by appellant wherein this court held that certain promises and false representations did not constitute such misrepresentations as would justify a rescission of a contract, but we think these are all clearly distinguishable from the case at bar. A mere promise to do something in the future, or a statement of that as a fact which is not a fact but the existence or non-existence of which does not mislead the other party, or the statement as a fact of some matter which the other party can readily see and know not to be a fact, has been held insufficient to sustain an action for rescission. But in the case at bar there was a misrepresentation made as to the amount of

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Opinion Per Root, J.

indebtedness outstanding against the property transferred, and as to the contracts affecting such property. These were matters clearly within the knowledge of the appellant, but not within the knowledge of respondent, and the latter's omission to ascertain about these matters prior to the purchase we do not deem sufficient to prevent him from maintaining an action for rescission, when commenced promptly after he discovered the misrepresentations.

It is urged that the lower court erred in excluding oral testimony of one Latch, to the effect that plaintiff was requested to go and see the vendors as to the amounts due, and said he knew that everything was all right and that it made no difference as Erskine (the appellant) was worth it anyhow. The effect of this evidence would have been to contradict or vary the terms of the written contract of sale made by and between the parties. Under the circumstances shown here, we do not think that the court erred in rejecting this proffered testimony.

No error appearing in the record, the judgment of the superior court is affirmed.

HADLEY, C. J., FULLERTON, and CROW, JJ., concur.

Opinion Per Root, J.

[49 Wash.

[No. 7141. Decided April 2, 1908.]

THOMPSON-SPENCER COMPANY, *Appellant*, v. O. A.THOMPSON *et al.*, *Respondents.*¹

QUIETING TITLE—EVIDENCE—SUFFICIENCY—DEFENSES—STIPULATED DAMAGES—PARTNERSHIP—DISSOLUTION—EFFECT OF STIPULATION. Where copartners dissolved partnership and formed a corporation, agreeing to convey all their real estate to it in consideration of stock, but in the conveyance a certain tract was omitted because of pending negotiations for its sale or trade to a third party, which however was never consummated, the corporation is entitled to have its title quieted as against such third person and a retiring partner who had made a quitclaim deed thereof to such third party with full knowledge of the facts; and the fact that the copartners, upon dissolving partnership and transferring the interest of one to the other, had agreed upon stipulated damages for breach of the terms of their dissolution agreement, would have no effect upon the corporation's right to relief.

Appeal from a judgment of the superior court for Stevens county, Sullivan, J., entered April 24, 1907, upon sustaining defendants' motion to dismiss the action at the close of plaintiff's case, in an action to quiet title. Reversed.

Danson & Williams, for appellant.

Jesseph & Grinstead and *H. N. Martin*, for respondents.

Root, J.—The material facts appearing from the evidence in this case were substantially as follows: Appellant, Thompson-Spencer Company, is a corporation and was organized early in September, 1905. Respondents O. A. Thompson and Celin R. Thompson are husband and wife, and respondents H. N. Martin and A. V. Martin are husband and wife. About January 1, 1904, O. A. Thompson and E. L. Spencer formed a partnership under the name of Thompson-Spencer Company, for the purpose of conducting a sawmill business at Arden, Washington. The partnership at the time of com-

¹Reported in 94 Pac. 935.

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Opinion Per Root, J.

mencing to do business acquired considerable personal and real property for use in the partnership business, and included in this property was the southeast quarter of the southwest quarter of section 10, township 34, north, of range 39, E., W. M. On this forty acres of land above described was located, in part, the planing mill of the partnership, and it was further used for the purpose of piling its lumber and logs. The sawmill of the partnership was located on an adjoining tract of land, and past the mill flowed the Colville river. The mill was down the stream from the particular forty acres involved in this action. The Colville river was used in floating logs to the mill, where they were cut into lumber. Before reaching the mill, the Colville river crossed one corner of this disputed forty acres, and this portion of the river and the sloughs from the river on this forty acres were used for the purpose of storing logs. The slip or logway from the mill extended into the Colville river on this particular forty acres.

Prior to September 6, 1905, the partnership had become heavily involved financially and was at that time owing debts aggregating about \$23,000. The partners, Thompson and Spencer, were unable to agree upon the management and conduct of the business, and were unable together to raise the necessary funds to meet their obligations. Under these circumstances it became necessary that they should dissolve the partnership, and as Thompson was unwilling or unable to purchase the interest of Spencer, it was agreed that Spencer should purchase the interest of Thompson. Spencer was unable to pay cash for Thompson's interest, and in order to satisfactorily secure Thompson and carry out their plan of sale and purchase, it was agreed that they would form a corporation with the capital stock of \$50,000, and would convey all of the assets to such corporation, the corporation to assume and pay the obligations of the partnership; that in so forming the corporation, half of the capital stock should be issued to Thompson and half to Spencer, and that Thompson would give Spencer an option to purchase his (Thompson's) stock at a

date fixed, upon the payment of \$5,000, and until such time Thompson's stock should be placed in escrow; that during the existence of the escrow, Spencer should have the right to manage the corporation without interference from Thompson; that one-tenth of one share of the stock of Thompson should be issued to one A. C. Shaw so that he might qualify as a trustee and act until the expiration of the escrow. A written contract embodying the agreement of the partners was entered into on September 6, 1905, by Thompson and Spencer. In this written contract, among other things, it is provided:

"Whereas, the said parties have become satisfied that it is for their mutual interest to virtually dissolve the co-partnership heretofore existing between them, and to divide as nearly as may be the surplus over and above the co-partnership debts, and,

"Whereas, the said parties deem it for their interest to form a corporation and divide the stock between themselves and enter into a contract for the sale thereof by one to the other, and, -

"Whereas, the co-partnership have assets aggregating approximately \$35,000 and owe to other persons approximately \$23,000. . . . It is further understood and agreed that in the transfer of the assets of the co-partnership to the corporation now being formed that it shall be stipulated and agreed in such transfer that the said corporation assume and agree to pay the existing obligations of the co-partnership heretofore existing between said Thompson and the said Spencer and that in case of their failure so to do that said Thompson or Spencer, or both, shall have the right to prosecute an action to compel it so to do."

Immediately after the above contract was made between Thompson and Spencer, articles of incorporation were prepared and executed incorporating appellant Thompson-Spencer Company. The minute book of the corporation was produced in evidence and the material portions showing the organization were introduced in evidence. The minute book, under date September 6, 1905, recites:

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"O. A. Thompson, E. L. Spencer and A. C. Shaw being about to continue a lumber business heretofore conducted by Thompson and Spencer and believing that it can be better conducted to their mutual satisfaction if a corporation is organized and the stock divided between them, have on this day signed in triplicate articles of incorporation. . . ."

The minutes of the first meeting contain the following:

"Thompson and Spencer propose to transfer to the company the assets of the co-partnership for the sum of \$50,000.00, the corporation to assume and pay as part of the purchase price, the co-partnership obligations and debts of the co-partnership, the purchase price of the assets being payable in stock of the company, the insurance on the property transferred to be assigned to the company, it was therefore resolved that the property be accepted. Unanimously carried."

At the meeting of appellant Thompson-Spencer Company, at which these records above mentioned were made, all of the incorporators, stockholders and trustees were present and participated. The minutes of these meetings were read to Mr. Shaw at such meeting, he having been the attorney employed in organizing the company and having previously prepared the necessary record for the purpose of completing the organization. Thereafter half of the stock was issued to E. L. Spencer, half of the stock (less one-tenth of a share) to O. A. Thompson, and one-tenth of a share to A. C. Shaw. The stock standing in the name of Thompson and Shaw was then placed in escrow, pursuant to the contract between Thompson and Spencer. The option to purchase this stock was thereafter exercised by E. L. Spencer and the purchase price therefor paid.

Previous to the organization of the corporation the partners, Thompson and Spencer, had discussed the advisability of trading a portion of this forty acres to respondent H. N. Martin for certain overflow land owned by said Martin, but an agreement had never been reached. For the purpose of making a formal transfer from the partnership to the cor-

poration, Mr. Shaw prepared the proper bills of sale and deeds evidencing the contract and agreement above set out, and in the deeds this particular forty acres, as well as other land, was included. These deeds and bills of sale contained all of the provisions called for by the contract, including the assumption of the indebtedness of the partnership. When the deeds were presented for signature, respondent O. A. Thompson suggested that respondent H. N. Martin had requested that this particular forty acres should not be formally transferred to the corporation, as he preferred his deed, in the event a trade was made, to come direct from the partners. Upon this suggestion being made by Thompson, the deeds were changed so as to exclude this particular forty acres, for the purpose of having the deeds run direct to Martin from the partnership, rather than the corporation, if a trade was made. Thereafter some further negotiations were had with reference to a trade of a portion of this forty acres by the corporation to respondent H. N. Martin for certain overflow land, but a deal was never consummated. Thompson and Martin called at the office of the corporation several times and attempted to complete some trade with the corporation through E. L. Spencer, its president, but an agreement was not made. During all of this time the corporation was in possession of this forty acres, using it in the conduct of its sawmill business in the manner in which the partnership had previously used it. Respondent H. N. Martin, with the consent of the corporation, had previously done certain slashing on this land and had constructed a wire fence across a portion of it. This wire fence was run for the purpose of preventing cattle crossing a certain county bridge. Thereafter it came to the corporation's notice that Martin was claiming that he had a contract for the purchase of a portion of this forty acres and was entitled to occupy same, and thereupon the corporation immediately tore down the fence that had been constructed. After all this had transpired and on May 28, 1906, O. A. Thompson and Celin R. Thompson executed to respondent

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H. N. Martin a quitclaim deed for the entire forty acres, and the deed was placed of record. This deed was acknowledged by respondents Thompson, and in the acknowledgment there appears the following:

"Also O. A. Thompson acknowledged to me that he is the same person who, together with E. L. Spencer, constituted the Thompson and Spencer copartnership."

Upon the recording of this deed from respondents Thompson to H. N. Martin, appellant, Thompson-Spencer Company, brought this action, reciting the above facts in substance, and asking for a decree adjudging it to be the owner of the said forty-acre tract and to have its title quieted and all clouds thereon removed, and for decree requiring the respondents to execute the necessary instruments for the purpose of clearing the title, and further prayed that in the event appellant's title should not be sustained, that it recover an affirmative personal judgment against respondents O. A. Thompson and Celin R. Thompson for the value of said real estate and its damage. After the introduction of appellant's evidence showing the facts as above stated, respondents moved to dismiss the action, and their motion was sustained. This appeal is from the order and judgment so made by the court.

The contention of respondents is that this particular forty acres was to be deeded to Martin in consideration of certain overflow lands owned by Martin, which it was desirable that the copartnership and its successor, the corporation, should own for use in the sawmill and lumber manufacturing business; that this arrangement was made long prior to the formation of the corporation, and that the transfer by Thompson to Martin was a consummation of such agreement. It appears that on October 6, 1905, Martin wrote a letter to the Thompson-Spencer Company, in which it very plainly appears that some previous arrangements and negotiations had taken place between Martin and Thompson and Spencer relating to a transfer of the forty acres for overflow land, at a transfer of overflow land to Thompson and Spencer. It ap-

pears from the language of this letter that Spencer had knowledge of dealings with Martin regarding this transfer. It also appears that Martin was at Arden on several occasions regarding the transfer of this land. In pursuance of the negotiations to transfer the forty-acre tract in question to Martin, he had slashed and fenced the same, all to the knowledge of Spencer and the Thompson-Spencer Company, and all this without objection from Spencer or appellant.

The contract between Thompson and Spencer recites that in case of breach of its terms and provisions by either party, the damage for such violation should be \$500, that portion of the contract so providing being in words and figures as follows:

"It is mutually understood and agreed that in case of any violation of the terms and conditions of this contract, that the damages shall be \$500, which is fixed and agreed upon as stipulated damages and in no sense to be considered a penalty."

Respondents contended before the lower court, and now contend, that the parties to this contract having provided therein what the remedy for a violation thereof should be, waived any right to specific performance, assuming that such remedy existed.

We are unable to agree with the conclusion reached by the honorable trial court. We think the evidence produced justified relief to appellant. The respondents should have been required to present their evidence. The entire transaction should have been gone into, and such a decree rendered as would mete out substantial justice to all parties concerned. The provision for an allowance of \$500 as stipulated damages has no application to the matter in issue herein.

The judgment of the honorable superior court is reversed, and the case remanded for further proceedings not inconsistent with the views herein expressed.

HADLEY, C. J., DUNBAR, RUDKIN, CROW, and MOUNT, JJ., concur.

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Syllabus.

[No. 7262. Decided April 2, 1908.]

THE STATE OF WASHINGTON, on the Relation of Chester Thompson, Plaintiff, v. W. H. SNELL, as Judge of the Superior Court for Pierce County, Respondent.¹

INSANE PERSONS—CONFINEMENT OF INSANE CRIMINALS—DISCHARGE—PROCEEDINGS—NOTICE OF APPLICATION—FORUM. Where, on change of venue to another county, a person is tried and acquitted of crime on the ground of insanity and adjudged to be unsafe to be at large, it is the duty of the prosecuting attorney of the county in which the commitment was made to resist an application for his release, within Laws 1907, p. 33, § 6, providing for service of the application, in view of other provisions making the committing court the proper forum and such attorney the proper resisting officer in kindred proceedings; hence service of the application need not be made upon the prosecuting attorney of the county wherein the information was filed.

SAME—PARTIES ENTITLED TO DISCHARGE—SCOPE OF ACT. Laws 1907, p. 33, relating to the confinement of the criminal insane, is not restricted to persons committed thereunder according to the terms of section 6, in view of section 9 extending its provisions to all criminal insane "now confined in the state hospitals for the insane" or in the penitentiary; hence the provisions for discharge from custody may be taken advantage of by one tried and committed before the act went into effect, and whether actually confined at that time or not; since when committed he was constructively confined, and since the act was intended to apply to all criminal insane, regardless of the time of their commitment or confinement.

SAME—CONSTITUTIONAL LAW—Ex POST FACTO LAWS—REMEDIES NOT PENAL. The requirement that the criminal insane shall obtain a certificate from the physician and permit from the warden of the penitentiary before making application for release is not unconstitutional as an *ex post facto* law, and invalid because imposing burdens that did not exist at the time of the commitment; since such laws are not penal and merely affect modes of procedure, to which the term *ex post facto* has no application.

SAME—WHO MAY OBJECT To. The state cannot urge the unconstitutionality of laws as being *ex post facto*, where the party elects to submit to the additional burdens imposed upon him thereby; as objection can only be made upon resistance to the law.

¹Reported in 94 Pac. 926.

Opinion Per RUDKIN, J.

[49 Wash.

Application filed in the supreme court March 17, 1908, for a writ of mandate requiring the superior court for Pierce county, Snell, J., to set for hearing a petition praying for the discharge from custody of a defendant acquitted of the charge of murder on the ground of insanity. Writ granted.

Will H. Thompson, for plaintiff.

Harry G. Rowland, for respondent.

RUDKIN, J.—On the 7th day of July, 1906, the relator, Chester Thompson, killed George Meade Emory in the city of Seattle, and by reason thereof was informed against in the superior court of King county for the crime of murder. A plea of not guilty was interposed, and the place of trial was changed to the superior court of Pierce county. The relator was tried in the latter court before the respondent as presiding judge, and the jury returned a verdict of not guilty by reason of insanity. On the 3d day of May, 1907, the respondent entered an order reciting that the relator was then insane; that he had been acquitted of the crime of murder by reason of insanity; that his discharge or going at large would be manifestly dangerous to the peace and safety of the community; and committed him to the county jail of Pierce county. It was further ordered that, on the 12th day of June, 1907, the relator should be taken from the county jail of Pierce county and transferred to the state penitentiary at Walla Walla, to be there confined in the ward set apart for the confinement, custody, and keeping of the criminal insane until the further order of the court and until discharged therefrom by due process of law. The relator was committed to the county jail and thereafter transferred to the insane ward of the penitentiary in obedience to this order, and is now confined in the latter institution. On the 19th day of February, 1908, he applied to the physician in charge of the criminal insane at the state penitentiary for an examination of his mental condition and fitness to be at large, as provided in § 6 of the act of February 21, 1907, entitled, "An act re-

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lating to the criminal insane, their trial, commitment, and custody." Laws of 1907, page 33. After such examination, the physician certified to the warden of the penitentiary that he had reasonable cause to believe that the relator had become sane since his commitment, and was a safe person to be at large. The warden thereupon granted the relator permission to present a petition to the court that committed him, setting up the facts leading to his commitment, and that he had become sane and mentally responsible, and in such condition that he is a safe person to be at large, and praying for his discharge from custody. A petition in due form was thereupon presented to the respondent judge, after service thereof upon the prosecuting attorney of Pierce county, but the respondent refused to set the matter down for hearing or to entertain jurisdiction of the proceeding, for two reasons; (1) because no notice of the application was served on the prosecuting attorney of King county; and (2) because the relator was tried, acquitted, and committed to the penitentiary before the act of February 21, *supra*, became a law, and for that reason was not entitled to avail himself of the provisions thereof. Application was thereupon made to this court for a writ of mandamus, requiring the respondent to set the petition down for hearing, and the case is now before us on the return to the alternative writ.

The objections urged against the issuance of the writ are the two assigned by the learned judge of the court below, and the further objection that the act in question is unconstitutional as applied to the relator's case. The first objection relates to the service of the application for a discharge on the prosecuting attorney of Pierce county. Section 6 of the act provides that the petition shall be presented to the court that committed the insane person, and "shall be served on the prosecuting attorney of the county, whose duty it shall be to resist the application." It seems manifest to us that the service was properly made on the prosecuting attorney of the county in which the application was made. The proceeding

for a discharge is in no manner dependent upon the proceeding in the original case. It was for the legislature to designate the court in which the proceeding should be instituted and the officer who would resist the application on the part of the state. The legislature designated the committing court as the proper forum, and the prosecuting attorney of that county as the proper officer to defend. The phrase "whose duty it shall be to resist the application" was evidently employed to impose a duty on the prosecuting attorney, and not to designate the officer who should be served or resist the application. Such is the natural construction of the language used, and this view is fortified by other provisions of the act. Thus, § 7 provides that:

"Should any criminally insane person discharged hereunder again become insane or mentally irresponsible, or be found to be an unsafe person to be at large because of mental unsoundness, *the prosecuting attorney of the county from which he was committed* may file a petition in the name of the State, setting up the facts leading to his commitment and subsequent discharge, and the relapse which is the basis of the petition."

Section 10 provides that:

"The prosecuting attorney of any county wherein a person may have been acquitted of a crime because of his insanity or mental irresponsibility may cause any such person who is not in custody to be brought before the superior court of that county for trial as to the question of his sanity or mental responsibility by filing a petition in the name of the state setting up the commission of a crime by such person, his acquittal thereof because of his insanity, and his insanity or mental irresponsibility at the present time."

From all these provisions it is apparent that the prosecuting attorney of the county in which the hearing is had shall be served and must resist the application.

Nor do we think that the second objection is tenable. While § 6 of the act is by its terms limited to persons committed thereunder, yet § 9 provides that:

"All the criminal insane now confined in the state hospitals

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for the insane shall be forthwith sent by the authorities of those hospitals to the state penitentiary, and placed in the control of the warden and confined by him in the ward or department for the criminal insane, herein provided for, and shall not thereafter be discharged from his custody save in the manner herein provided. Any criminally insane person now confined in the state penitentiary shall be transferred to the ward for the criminally insane, and shall not be discharged, save as herein provided."

Whether the relator was confined in the penitentiary at the time the act took effect we need not inquire. He had been committed to that institution, and was there constructively, at least. Furthermore, we are satisfied from all the provisions of the act that it was intended to apply to all the criminal insane of the state, regardless of the time of their commitment or the place of detention.

The last objection is that the act is unconstitutional as applied to the relator, because it imposes burdens upon him which did not exist at the time of his commitment, such as the requirement that he must obtain a certificate from the physician in charge of the penitentiary and a permit from the warden. This objection is not well taken. The term *ex post facto* law, as used in the constitution, is confined to laws respecting criminal punishment, and has no relation to retrospective legislation of any other description. Cooley, Const. Lim. (6th ed.), p. 318. Laws providing for the commitment, detention, and discharge of the insane are not penal in any sense of the word, and the term *ex post facto* laws has no application to laws which merely affect or change modes of procedure. The requirement that an insane person must obtain a certificate from a certain physician and a permit from the warden of the penitentiary before he can apply to a court of justice for his discharge may be unconstitutional as to any and all persons affected by it, but that question is not before us, and we express no opinion upon it. If the relator elects to submit to these additional burdens imposed upon him,

it is not for the state to interpose the objection that the burdens are wrongfully or illegally imposed.

"*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation and calls in the aid of the judicial power, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law, in the conclusion, that such an act is not void, but voidable only; and it follows as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only it is necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of the legislative power, and to this extent only, therefore, are courts of justice called on to interpose." *Wellington et al., Petitioners*, 16 Pick. 87, 26 Am. Dec. 631.

See, also, Cooley, Const. Lim. (6th ed.), p. 196.

We are of opinion, therefore, that the procedure adopted by the relator is in conformity with the law, and the writ will issue as prayed.

HADLEY, C. J., DUNBAR, FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

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Syllabus.

[No. 6807. Decided April 2, 1908.]

A. H. GREGG, *Administrator of the Estate of Sarah May Wright et al., Appellants, v. NORTHERN PACIFIC RAILWAY COMPANY, Respondent.*¹

APPEAL AND ERROR—REVIEW—GRANT OF NEW TRIAL—GROUNDS OF ORDER—RECORD. The record discloses that a new trial was granted on points of law which may be reviewed on appeal, and excludes other grounds involving the discretion of the trial judge, where it appears that two grounds of negligence were alleged as the cause of the death of a person struck by an engine; that the court, in a letter to the attorneys deciding the motion for a new trial, stated that he erred in submitting to the jury one of the grounds of negligence, and in denying defendant's requested instruction withdrawing that issue, upon which issue he concluded that there was no evidence to submit to the jury, stating that this "was the principal ground relied upon for a new trial and it will be granted upon this ground," and that he did not at that moment recall or pass upon the other grounds, if any; that this letter was included in the statement of facts and made part of the record; and that the judge later refused to sign an order reciting as the sole ground of error the refusal of the defendant's instruction requesting withdrawal of that issue from the jury, but entered a general order overruling the motion for a new trial without reciting any ground therefor; the motion for a new trial embracing the grounds of excessive damages and insufficiency of the evidence to sustain the verdict (RUDKIN and FULLERTON, JJ., dissenting).

RAILROADS—NEGLIGENCE—DEATH OF PEDESTRIAN ON TRACK—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for the death of a person struck by an engine, based upon negligence of the railroad company before the deceased was struck, and also in starting up the engine again while deceased was still alive and in a position of peril, it was error to refuse to charge that the deceased's contributory negligence in going on the track without stopping to look or listen would bar a recovery, unless the company failed to exercise reasonable care after learning that the deceased was in a position of danger.

SAME—LOOKING AND LISTENING—QUESTION FOR JURY. A man fifty-one years of age possessed of all his faculties, is guilty of contributory negligence, as a matter of law, in crossing a railroad track at a station to board an incoming train, where it appears that he

¹Reported in 94 Pac. 911.

knew the train was coming in and stepped from behind the corner of a house eight feet from the tracks, in front of the approaching engine, which was only fifteen feet distant, attempting to cross to the station platform without stopping to look or listen for the train.

CARRIERS—WHO ARE PASSENGERS. / A person crossing a railroad track to reach a platform with the intention of taking a train, is not a passenger, although no tickets are sold at that station and fares were to be paid on the train. /

SAME—CONTRIBUTORY NEGLIGENCE—CROSSING ROADS. The fact that one is a passenger does not relieve him from the consequences of contributory negligence in crossing a track in front of a moving train without stopping to look or listen.

HADLEY, C. J., and Root, J., dissent.

Appeal from an order of the superior court for Spokane county, Huncke, J., entered August 25, 1906, granting a new trial to the defendant, in an action for the death of a pedestrian struck by defendant's train. Affirmed.

Robertson & Rosenhaupt, Fred Miller, and L. O. Whitsell, for appellants.

Edward J. Cannon, for respondent.

Crow, J.—Sarah May Wright and Florence May Wright, widow and infant daughter of William Wright, commenced this action to recover damages for his death, alleged to have been caused by negligent acts of the defendant, the Northern Pacific Railway Company. The opinion of this court on a former appeal, *Wright v. Northern Pac. R. Co.*, 38 Wash. 64, 80 Pac. 197, contains a statement of the pleadings. After the cause was remanded a second verdict in favor of the plaintiffs was set aside and a new trial ordered. From the order granting the new trial, the plaintiffs have appealed.

The respondent's Burke branch road, about eleven miles in length, occupies a mountain canyon in Idaho, extending up a four per cent grade from Wallace to Burke. At Frisco, one of four intermediate stations, the railway platform was located on one side of the respondent's track, and on the other side was the Frisco boarding house fronting up the canyon

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towards Burke. The kitchen towards Wallace was only about eight feet from the track. Mr. Wright had come to Frisco a day or two before his death to take charge of this boarding house, with which it is not contended the respondent was connected. The railway platform intended for the use of passengers was without shelter, there being no station building or ticket office. Passengers received at Frisco paid fare on the train. Several electric arc lights in the immediate locality were shown to be burning. No witness positively testified that they were not burning. The upper end of the canyon is so narrow at Burke that the engine cannot be turned. It is there switched to the rear of the train, which returns to Wallace, running down grade by gravity with tender, engine, and cars in the order mentioned. The engine ordinarily used was provided with two white lights commonly known as headlights, one placed on the rear end of the tender for use in returning down grade. On the evening of the accident this regular engine had been laid off for repairs, and another substituted, provided with two red lantern lights, one on each side of the rear end of the tender. Although the train ran down grade by gravity, a full head of steam was maintained by the fireman and engineer for switching and other purposes. The appellants offered evidence, much of it disputed, which tended to show that, on the evening of the accident, the bell was not rung; that the engine was not puffing steam; that the train made but little noise; that the night was dark, and the weather somewhat inclement; that according to the rules of the company the two red lights on the tender indicated the rear end of a departing train; that they were also a sign of danger, and that they were dim, affording but little light.

The undisputed evidence shows that, on November 22, 1904, Mr. Wright intended to go to Wallace; that intending passengers frequently remained in the boarding house awaiting the coming of the train; that Wright and others who were there knew the train was coming; that some of them heard its approach; that he told one of the waiter girls, who was also

going to Wallace, to hurry or she would be left; that he passed through the kitchen and down some steps; that when he reached the lower step, about eight feet from the track, he emerged from behind the building theretofore between him and the approaching train; that he walked in a diagonal direction towards the track, stepped between the rails, and was instantly struck by the train; that one Hoover saw him come from the kitchen and walk to the track; that the waiter girl who had followed him saw him step between the rails, and that the fireman, who was keeping a lookout down the track, saw him come from behind the boarding house about twelve or fifteen feet ahead of the tender, and walk upon the track. Hoover and the fireman both testified that he walked diagonally to the track, and that he did not look or appear to listen. No other witnesses who saw him disputed this evidence.

The testimony of Mr. Hoover, the fireman, and the waiter girl, considered together, shows that at least one of them saw him at every point of his progress from the kitchen door to the center of the track, yet not one of them testified that he looked toward the approaching train, their only recollection being that he did not do so. In making this statement we are not unmindful of the fact that Mr. Hoover, on cross-examination, said: "Well, he might have looked out of the boarding house." Upon this remark, which is no recital of actual knowledge of the witness, but a surmise only, appellants predicate the contention that Mr. Wright did look. The fireman stated that, when he saw Mr. Wright, he immediately notified the engineer, who at once made an emergency application of air to the brake, or, as he expressed it, "dynamited the train." On approaching Frisco, and before the fireman saw Mr. Wright, the engineer made a service application of air and slackened his speed to four or five miles an hour.

The appellants introduced further evidence, also vigorously disputed, tending to show that after the train first struck Mr. Wright, it continued down grade for a distance of from fifty to eighty feet; that his clothing caught on the brake or brake

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beams; that he was thus pushed ahead of the train, that when it stopped, he was on the track, held in front of the wheels; that he was alive and struggling to extricate himself, and that before he was removed, the engineer negligently started the train, causing the wheels to pass over and instantly kill him. On the trial the appellants contended that the respondent was guilty of negligence in the first instance in noiselessly running its train down grade on a dark night without any headlight, without ringing the bell, without giving any other signal, and in having the two red lights which indicated a receding rather than an approaching train; that it was thereafter negligent in wantonly running its train over Mr. Wright while he, still alive, was pinioned to the track under the wheels. The respondent denied negligence on its part, but contended that Mr. Wright was guilty of contributory negligence.

The trial judge announced his decision in a letter to the respective attorneys, in which he said:

"At the conclusion of plaintiffs' case, defendant challenged the sufficiency of the evidence and moved that the jury be discharged and the court direct what judgment should be entered, defendant relying upon the ground that plaintiffs' testimony showed that deceased had failed to exercise that care which the law requires of all persons who knowingly cross a railroad track. I stated in answer to defendant's argument on this motion that if that were all there was in the case, that I should have no hesitancy in granting his motion, and then added that there was testimony showing another feature, namely the backing of the train after deceased had been knocked down, which would have to go to the jury, for which reason the motion was denied. Defendant requested an instruction upon the same ground, but as I had decided to send the case to the jury I did not think at the time of the importance of this phase of the case, and hence sent the whole case to the jury. I regret now that I did not take time to consider the requests for instructions, for if I had, I have no doubt that I should have taken from the jury the first phase of the case, i. e., that deceased received his first injury through his own want of care, and that defendant would not be liable therefor. In my judgment this is not a question of fact for

the jury, but is a question of law for the court. There is no testimony whatever that I recall, tending even remotely to show that deceased was in the exercise of due care as he was about to cross the track, but the testimony is all one way; that he knew that the train was coming and was near at hand; that he himself left the boarding house—only a few feet away—for the purpose of boarding that identical train; that he called to others present to hurry or they would miss the train; that he walked down the steps and stepped upon the track and almost instantly was knocked down by the approaching train; that the train had at least two red lights displayed upon the end that was approaching him; and that the track was straight and entirely clear of obstruction. There is an allegation that the train was running at a high and dangerous rate of speed, but there is no testimony at all to support this allegation. There is no testimony therefore to show any negligence on the part of the defendant this far in the story of this accident, and under such state of the evidence, it would not be right to permit that question to go to the jury in the face of a request on the part of the defendant that it be taken from them. This was the principal ground relied upon for a new trial, and it will be granted upon this ground. If there were other grounds presented, I do not at this moment recall them, and they are not passed upon. . . . I am convinced that I erred in denying the request of defendant to instruct the jury as requested, and therefore feel compelled to grant the new trial."

This letter has been included in the statement of facts and made a part of the record. The appellants presented an order which recited that the new trial was granted on the sole ground of error in refusing the instruction requested by respondent. This order the court declined to sign, presumably for the reason that it did not fully state the substance of his written opinion. A general order was entered not stating any particular grounds. With the record in this condition, the respondent's attorney contended on the oral argument that it does not clearly appear that the motion for a new trial was granted on points of law which may now be reviewed on this appeal, excluding other grounds involving the discretion of the trial judge. The majority of this court, including the

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writer, think the contention cannot be sustained, but only two of such majority favor an affirmance of the order of the trial court. The writer being of the opinion that only questions of law not involving any discretion are now before us for consideration, will announce his views in stating his reasons for affirming the judgment of the trial court.

The trial judge correctly indicated in his opinion that there were separate and distinct acts of negligence urged against respondent; (1) those alleged to have occurred before the train struck Mr. Wright, and (2) those alleged to have occurred while he, still alive, was under the train. There was evidence which, although disputed, tended to show these separate acts of negligence. The issues as to whether the latter acts were proven and respondent's liability therefor were properly submitted to the jury. For the first-mentioned acts the respondent could not be held liable unless Mr. Wright was free from negligence upon his part, which contributed to, or was the proximate cause of, the accident. The following is the instruction requested by the respondent:

"I charge you that William Wright, the deceased, was guilty of negligence in going upon the railway tracks without looking and listening for approaching trains, and such negligence bars a recovery in this action, unless you find that the defendant railway company's servants, after learning that said deceased was in a position of great danger and peril, failed to exercise reasonable diligence and care to prevent injuring him."

The trial judge in granting the new trial correctly held that it was prejudicial error to refuse this instruction.

In ascertaining the existence or nonexistence of negligence that issue must be considered relative to all the circumstances of time, place, and person. No two cases can be found in which the facts are identical. Contributory negligence is ordinarily a question to be passed upon and determined by the jury. A trial court should not withdraw such issue from their consideration, and hold a party guilty of contributory negligence as a matter of law, unless after giving such party the

benefit of all controverted questions of fact, and every reasonable inference to be drawn therefrom and from conceded facts, it indisputably appears that such negligence did exist, and was, in whole or in part, the proximate cause of the accident. Bearing this rule in mind, we are compelled, upon consideration of the facts before us, to hold that the deceased was guilty of contributory negligence as a matter of law. The undisputed evidence shows that he was a man fifty-one years of age, possessed of good eyesight, hearing, and bodily vigor; that he was familiar with the locality and its surroundings; that before he left the boarding house he knew the train he intended to take was coming; that he told others to hurry or they would be left; that from the front of the boarding house one could see up the track several hundred feet; that he made his exit through the kitchen, where he could not look up the track until he was within eight feet of the nearest rail; that on emerging from behind the building he did not stop, look, or listen, but walked in a diagonal direction, looking from the train, until he stepped between the rails and was instantly struck by the tender. How a man in possession of all his faculties could do these acts and not be held guilty of contributory negligence as a matter of law is beyond comprehension. *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 87 Pac. 1058; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542.

Appellants insist that the instruction requested by respondent was erroneous and properly refused, contending (1) that the deceased was a passenger to whom respondent owed the highest degree of care, and (2) that being a passenger he was entitled, in going to the train, to presume that he could do so with safety, and that, in view of such relation and conditions, it was for the jury to determine whether he was negligent in failing to stop and look or listen for the approaching train.

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It may be conceded that it is not always necessary for one to have actually boarded a train, or to have even purchased a ticket before becoming a passenger. The deceased could not purchase a ticket, there being no ticket office or agent at Frisco. Unquestionably he intended to become a passenger, but did he occupy such an attitude relative to the respondent as to make him one? We hold that, under the facts shown, he did not. He had not, within a reasonable time prior to the arrival of the train, which he intended to take, placed himself upon the platform provided for his use, so that he might be looked upon as a passenger and accepted as such by the respondent. In *Chicago etc. R. Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827, the court said:

"It is not necessary, to create the relation, that the passenger should have entered a train, but if he is at the place provided for passengers, such as the waiting room or platform at the station, with the intention of taking passage and has a ticket, he is entitled to all the rights and privileges of a passenger. A railroad company owes a general duty to receive and carry those who present themselves at the time and place provided for passengers requiring transportation. . . . When the passenger has presented himself at the proper place to be transported, his right to care and protection begins. Cooley, Torts, 653. But it is uniformly held that the passenger must have placed himself under the care of the railroad company, so that the circumstances will warrant an understanding on the part of the company that he is a passenger and under its care as such. . . . Since a railroad company owes the duty of protection to its passengers, it seems plain that the circumstances must be such that the company will understand that such a person is a passenger in its care and entitled to its protection. The company certainly has a right to know that the relation and duty exist, and the passenger must be at some place provided by the company for passengers, or some place occupied or used by them in waiting for or getting on or off trains. Whenever a person goes into such a place with the intention of taking passage, he may fairly expect that the company will understand that he is a passenger and protect him. If he could be a passenger before reaching such a place, there would be no limit or place where

it could be said that he became a passenger. The intention of taking a train would only prove a purpose to enter into the contract relation, but would not create it. Any person walking towards a train on a public sidewalk might have no intention whatever of taking the train, but might have an intention to keep on along the street. So long as a person merely intends to be carried, but has not reached any place provided for passengers or used for their accommodation, he is not a passenger."

See, also, § Thompson, Commentaries on Law of Negligence, § 2641; *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *June v. Boston etc. R. Co.*, 153 Mass. 79, 26 N. E. 238; *Southern R. Co. v. Smith*, 86 Fed. 292, 40 L. R. A. 746; *Fremont etc. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041.

But assuming that Mr. Wright was a passenger, such relation would not release him from every obligation to care for his own safety, nor would it permit him to deliberately step in front of a moving train without being guilty of negligence. The appellants in substance contend, that a passenger in going to or from his train may cross intervening tracks, without looking or listening, and not be held guilty of contributory negligence as a matter of law; that being a passenger he is entitled to presume the railroad company has provided for his protection and safety from passing trains, and that under such circumstances the question of his negligence in failing to look or listen, can only be determined by the jury. In support of this position they cite, with other cases, the following authorities: *Texas & Pac. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Illinois Central R. Co. v. Proctor*, 28 Ky. Law 598, 89 S. W. 714; *Betts v. Lehigh Valley R. Co.*, 191 Pa. St. 575, 43 Atl. 362, 45 L. R. A. 261; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 72 Am. St. 652, 45 L. R. A. 671; *Redding v. Central R. Co.*, 68 N. J. L. 641, 54 Atl. 431; *Atchinson etc. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; *Louisville etc. R. Co. v. Hirsch*, 69 Miss. 126, 13 South. 244. These cases are not ap-

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plicable to the facts before us. While in some of them passengers were injured and held not guilty of contributory negligence as a matter of law, it appears that they were going to or from trains on which they intended to travel or had been traveling; that in doing so they crossed intervening tracks, for instance, between themselves and the station, and that they were struck by other trains passing on such intervening tracks.

We have examined every case cited by appellants and find that no one of them relates to a person who, not having presented himself at the company's platform or depot as a passenger, was injured by passing in front of the identical train upon which he intended to travel, doing so as it was approaching the station and arriving at its stopping place. Railroads cannot accept and transport travelers without providing moving trains which must approach and depart from stations where passengers are received. If an intending passenger who has not presented himself on the railway platform can pass directly in front of the identical train upon which he expects to travel, doing so as it arrives at a station, and not be guilty of contributory negligence, it would be difficult to understand what acts would constitute such negligence. Under the undisputed facts of this case, we hold that the deceased was not a passenger, and that he was guilty of contributory negligence as a matter of law.

The order granting a new trial is affirmed.

MOUNT, J., concurs.

RUDKIN, J. (concurring)—I concur in the judgment of affirmance, but not in the construction placed on the final record made up in the court below by the opinion of Mr. Justice Crow. This court cannot review an order granting a new trial for error in instructions unless the record affirmatively shows that the new trial was granted on that ground and no other. It seems to me the record before us fairly shows that the new trial in this case was granted on the entire

record, and not for error in the instructions alone. The court below in the exercise of sound judicial discretion might well have granted a new trial for excessive damages appearing to have been given under the influence of passion or prejudice, or for insufficiency of the evidence to justify the verdict, and for aught that appears in this record did so.

FULLERTON, J.—I concur in the result for the reasons stated by Judge Rudkin.

HADLEY, C. J. and Root, J., dissent.

DUNBAR, J., took no part.

[No. 7064. Decided April 2, 1908.]

JOHN MCREA, Appellant, v. FRANK WAREHIME, Respondent.¹

PLEADING—SUPPLEMENTAL ANSWER—SETTLEMENT PENDING SUIT. It is proper to allow a supplemental answer to show a settlement made after the verification and service of the original answer.

ATTORNEY AND CLIENT—ACTIONS—SETTLEMENT BY CLIENT—RIGHTS OF ATTORNEY—CONTINGENT FEES. A party plaintiff may settle his cause of action without the consent of his attorney notwithstanding an agreement that the attorney was to be compensated by receiving one-half of the amount of any judgment recovered, where no collusion or fraud against the attorney is practiced and the attorney has not taken the steps provided by statute for asserting a lien upon the subject-matter of the action.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered March 19, 1907, upon sustaining defendant's motion to strike the affirmative reply, dismissing an action for personal injuries resulting from an assault and battery. Affirmed.

T. W. Maxwell and W. A. Wilson, for appellant.

HADLEY, C. J.—The plaintiff brought this suit to recover for personal injuries resulting from an assault and battery

¹Reported in 94 Pac. 924.

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alleged to have been committed by the defendant upon the person of the plaintiff. The defendant first answered by general denial, and later filed an amended supplemental answer which affirmatively alleged a settlement of the cause of action. The supplemental answer referred to a written release signed by the plaintiff, whereby, in consideration of \$25 received from the defendant, he released the latter from all damages on account of the alleged injuries. The plaintiff replied to the supplemental answer, in effect, as follows: That he employed T. W. Maxwell, a practicing attorney of this state, to bring this action, who, in pursuance of the employment, instituted the suit; that after the suit was commenced the attorney asked the plaintiff concerning his attorney fees, at which time the plaintiff explained that he was poor and without means to pay an attorney; that he then proposed to Mr. Maxwell that he should proceed with the case, and that he should accept for his services a part of the judgment that the plaintiff might thereafter recover; that Maxwell consented to do so, and it was agreed that he should receive one-half of the amount of any judgment that should be recovered; that a short time thereafter Maxwell, as plaintiff's attorney, notified the defendant through his attorneys of the said contract and its conditions. The defendant moved to strike the affirmative reply, and the motion was granted. Thereupon the plaintiff stood upon his reply and judgment was entered dismissing the action, from which the plaintiff has appealed.

It is first assigned that the court erred in permitting the supplemental answer to be filed, for the reason that the facts alleged therein were known to the respondent on the 5th day of October, 1906, and yet even the original answer was not filed until October 29, 1906. The original answer was, however, verified on the 17th day of August, 1906, which was long before the facts about the settlement were known to the respondent, and service of that answer was admitted by appellant's counsel on the — day of August, 1907. It therefore became the original answer, a paper in the case which it

was proper to file. The facts about the settlement having developed after the preparation, verification, and service of the original answer, those facts could be brought before the court by supplemental answer only. It was therefore proper to permit the supplemental answer to be filed. The court stated that, if further time was demanded by appellant because of the filing of the supplemental answer, it would be granted. No such demand was made, and appellant replied to it at once. Under such circumstances there was no error in permitting the supplemental answer to be filed.

It is next assigned that the court erred in striking the affirmative matter from the reply. The question raised by this assignment is whether the appellant could settle his case without the consent of his attorney. The respondent has not appeared on this appeal and we are without the benefit of any brief in support of the judgment. It is appellant's contention that, by reason of his contract with his attorney, the latter has such an interest in the action as makes his consent to a settlement necessary. Assuming, without deciding, that the contract as made was a valid one, we find that the authorities are not in harmony as to the right of the client under such circumstances to compromise his case without his attorney's consent. We think the better reason is in favor of that right, particularly when ample methods are provided by statute for the attorney to protect himself. One should not be required to look after the fees of his adversary's attorney when the latter has not given the legal notice which in effect warns against settlement with the client without the attorney's consent.

Appellant alleges in the reply which was stricken that he notified the respondent's attorneys about his contract, but that did not make effective notice against a settlement. Bal. Code, § 4772 (P. C. § 8194), provides a specific manner for an attorney to assert a lien upon the subject-matter of an action. He may thereby effectually prevent a settlement of the case without his consent. The lien attaches upon money in the

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hands of the adverse party from the time the notice of lien is given, and the notice must necessarily be in writing since it must be filed with the clerk of the court and with the papers in the action. There are, as we believe, sound reasons in the interest of public policy why parties should have the privilege of settling their litigation without the necessary consent of their attorneys, unless possibly where it manifestly appears that such settlement is with the collusive and fraudulent purpose of defrauding counsel of their reasonable compensation. No issue of fraud or collusion is raised in this case. The issue presented is merely that of the naked power of a party to settle his own case without his attorney's consent. If such power should not be accorded to a party, we believe it might frequently result in unnecessary prolongation of litigation against his will.

"A client may at any stage of the case compromise or dismiss his action or suit, even though his attorney may object. The authority of an attorney being revocable at the pleasure of his client, he cannot object to any course the client may choose to take. He does not acquire any vested interest in the cause which is affected by the dismissal of the suit." 3 Am. & Eng. Ency. Law (2d ed.), 331.

See authorities there cited.

It is immaterial that the attorney is by agreement to receive a part of the sum which may be recovered. Without an express stipulation to that effect, an agreement for a contingent fee will not act as an assignment, and no interest in a future judgment exists without an assignment. 4 Cyc. 990.

The effect of appellant's stricken reply was simply to ask the continuance of litigation already settled, the continuance to be solely in the interest of collecting compensation for appellant's counsel. Although ostensibly a harmonious movement between attorney and client, yet in view of the voluntary settlement made by appellant with respondent, this new movement is, in legal effect, a controversy between appellant and his counsel over the latter's attorney fees. In *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. 135, we

held that controversies over such fees have no place in actions where the relation of attorney and client exists, and that claims for attorney's fees when adjusted by actions must be in suits brought for that purpose.

We find no reversible error, and the judgment is affirmed.

FULLERTON, Root, Mount, and Crow, JJ., concur.

[No. 7159. Decided April 2, 1908.]

JULIUS BRECHLIN, Appellant, v. NIGHT HAWK MINING COMPANY, Respondent.¹

JUDGMENT—BAR—RES JUDICATA—SPLITTING CAUSES—JUDGMENT ON MERITS. The dismissal of an action on contract upon objection that the complaint did not state a cause of action, because the contract was an illegal one by a corporation to traffic in its own stock, is *res judicata* of another action between the same parties to recover on the same contract, omitting the illegal portion of the contract referring to the traffic in the corporate stock, where it appears that the contract was an indivisible one; since a final judgment on demurrer that goes to the ground of recovery is a judgment on the merits; and letters referred to in the second action do not affect the matter where they related to the subject-matter of the original contract and do not constitute an independent basis for a cause of action.

CONTRACT—ENTIRE AND DIVISIBLE. A written contract for the sale of mining claims and shares of stock for a lump sum is an indivisible one.

Appeal from a judgment of the superior court for Okanogan county, Steiner, J., entered July 1, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

E. W. Taylor and E. Fitzgerald, for appellant.

G. V. Alexander, for respondent.

¹Reported in 94 Pac. 928.

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Opinion Per HADLEY, C. J.

HADLEY, C. J.—This action was brought to recover the sum of \$3,000, alleged to be due as the purchase price of a number of mining claims which the plaintiff claims were sold by him to the defendant corporation. The complaint alleges that on July 9, 1902, for and in consideration of \$3,000 to be paid by the defendant to the plaintiff, the latter agreed to sell, and did sell, the claims to the defendant, the said sum to be paid on or before February 1, 1903. It is further alleged that afterwards, on the 11th day of January, 1903, the defendant agreed to pay the \$3,000 as follows: \$1,500 on or before the 15th day of February, 1903, and \$1,500 on or before the 15th day of April, 1903, all of which it has failed to do. The agreement of July 9, 1902, to which the complaint refers, was in writing and was made with the plaintiff by one Wehe, who was at the time the president of the defendant company. The writing was drawn upon a printed letter head of the defendant company, and omitting the names of the officers printed upon the page, the instrument was as follows:

“Night Hawk, Wash., July 9th, 1902.

“I agree herewith to pay Julius Brechlin Five Thousand Dollars for his five mining claims, and all land lying in between Night Hawk Mining Co. claims and all his holdings in the Night Hawk Mining Comp. in shares the payment to be two thousand on or before November first, 1902, and the balance of three thousand dollars on or before February first, 1907.

A. M. Wehe.”

“Witness: A. George Wehe.”

Upon the above written agreement, the plaintiff, in the year 1903, brought an action against the defendant and alleged that, at the time the agreement was made the plaintiff owned fifty-six thousand five hundred and sixty-six shares of the capital stock of the defendant company; that said Wehe made the contract on behalf of the defendant; that the defendant had paid \$1,000 thereon, and judgment for \$4,000 was asked. The second and modified promise to pay, as alleged in the present action, was by way of letter written by the sec-

retary of the defendant company, at Milwaukee, Wisconsin, and directed to the plaintiff at Night Hawk, Washington. The plaintiff had this letter in his possession at the time he brought the former suit. That suit came on for trial in 1905, and objection was made to the admission of any testimony, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the objection and rendered judgment against the plaintiff. No appeal was taken from that judgment and it was in full force and effect when the present action was brought.

In the present action the defendant interposed three defenses; (1) a general denial of liability; (2) that the alleged contract of July 9, 1902, was entered into between the plaintiff and said Wehe on account of Wehe himself, and that he had no authority to make the same on behalf of the defendant; (3) the judgment in said former action was pleaded as *res judicata*. The trial was by the court without a jury, and the court found the necessary facts to establish all of these defenses. Judgment was rendered that the plaintiff shall take nothing by the action, and the plaintiff has appealed.

The assignments of error are based upon the court's findings and conclusions. It is contended that the defense of *res judicata* was not established. The evidence certainly shows that the parties to the former action were the same as in the present one, the appellant being plaintiff and the respondent defendant in both cases. The cause of action in each case was the same; viz., the recovery of the purchase price of certain mining claims, the only difference between the two actions being that in the present action the demand is for the purchase price of the mining claims alone, while in the former one it was for the purchase price of the mining claims and also for that of fifty-six thousand five hundred and sixty-six shares of the capital stock of the respondent company, claimed to have been held by appellant and sold by him to the respondent company that issued the stock. Both complaints refer to the contract of July 9, 1902, but the com-

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plaint in the present action omits to allege that the consideration for the demand includes the sale of the fifty-six thousand five hundred and sixty-six shares of capital stock as was alleged in the former action.

The court held, in the former action, that the contract as alleged was illegal, for the reason that it undertook to obligate the respondent as a corporation to traffic in its own stock. Appellant sought in this action to avoid the force of the former holding by omitting any demand on account of the shares of stock, and limited his demand to \$3,000 for the mining claims alone. The written contract was, however, an indivisible one. No part of the consideration of \$5,000 mentioned therein was apportioned to the mining claims and no part to the mining stock. But appellant sets up in his present complaint one or two letters written to him by the secretary of the respondent company as the alleged basis of the present action for \$3,000, and as distinguishing it from the former cause of action. He had those letters in his possession when he brought the former action. If the rule that what might have been adjudicated in a former action should be treated as adjudicated were applied, appellant would now be precluded by that rule from asserting any new element introduced by the letters. But without deciding whether that rule should apply here or not under the circumstances, it is nevertheless true that the letters do not attempt to segregate a part of the original contract price as applying to mining claims and a part to capital stock. What was said in the letters related to the subject-matter of the original written contract, and the complaint in the present action refers to that contract as the basis of sale and the cause of action. The letters, in other words, do not constitute an independent basis for a cause of action. But they grow out of and are dependent upon the original contract, which was an indivisible one and provided for the sale and purchase of both mining claims and capital stock. The cause of action being an indivisible one, and a suit having been once brought thereon in which

judgment went against appellant, the contract cannot now be divided and a subsequent suit maintained on a part of it. 24 Am. & Eng. Ency. Law (2d ed.), p. 786; 23 Cyc. 1174; *Kline v. Stein*, 46 Wash. 546, 90 Pac. 1041; *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566.

All the conditions necessary to render the former judgment *res judicata* are present. There is identity of the thing sued for, of the cause of action, and of persons and parties. But it is conceded by appellant that, since the former judgment was rendered on objection to the introduction of any evidence, it was not, therefore, a judgment on the merits which can be interposed as *res judicata*. The objection was upon the ground that the complaint did not state a cause of action, and when it was sustained and judgment entered upon the ruling, it was in the nature of a judgment on demurrer to the complaint. A final judgment rendered on demurrer which goes to the grounds of recovery is a judgment on the merits and is *res judicata*. 24 Am. & Eng. Ency. Law (2d ed.), p. 799; 23 Cyc. 1232; *Plant v. Carpenter*, 19 Wash. 621, 53 Pac. 1107; *Gould v. Evansville etc. R. Co.*, 91 U. S. 526, 23 L. Ed. 416; *Northern Pac. R. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738.

It follows that this action is barred by the former judgment, and that being true, it is unnecessary for us to discuss in detail other findings. We may say, however, that the evidence in the record in support of the defense on the merits is such that we think the court's findings thereon are supported and should not be disturbed.

The judgment is affirmed.

RUDKIN, DUNBAR, ROOT, CROW, FULLERTON, and MOUNT,
J.J., concur.

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Opinion Per HADLEY, C. J.

[No. 7222. Decided April 2, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Wilkeson Coal & Coke Company, Plaintiff, v. THE SUPERIOR COURT FOR PIERCE COUNTY et al., Respondents.*¹

CERTIORARI—REMEDY BY APPEAL—FORCIBLE ENTRY AND DETAINER—APPEAL—SUPERSIDEAS. There is an adequate remedy by appeal and therefore *certiorari* will not lie to review an order in an action of unlawful detainer, quashing a writ of restitution for insufficiency of the notice set out in the complaint; since the plaintiff may stand upon the notice and forthwith appeal from the final judgment, securing a supersedeas and review of the order; or may amend the complaint and secure another writ.

Application for a writ of certiorari to review an order of the superior court for Pierce county, Clifford, J., entered February 8, 1908, quashing a writ of restitution, in an action of unlawful detainer. Denied.

Hudson & Holt, for plaintiff.

Gay & Rummens, for respondents.

HADLEY, C. J.—This is an original application in this court for a writ of review, directed to the superior court of Pierce county and to the Honorable Miles L. Clifford, a judge thereof. The affidavit in support of the application shows that the petitioner was, on the 10th day of January, 1908, the owner of a leasehold interest in the lands upon which a certain described house was situate; that the house was in the possession of a tenant of the petitioner for an indefinite period, with monthly periodical reservations of rent payable at the expiration of each month; that desiring to terminate the tenancy at the expiration of the month of January, 1908, the petitioner gave notice in writing to that effect on the 10th day of that month; that, possession not having been yielded in

¹Reported in 94 Pac. 920.

obedience to the notice, the petitioner, on February 3, 1908, brought an action of unlawful detainer against the tenant, procuring immediate issuance of a writ of restitution under the statute and obtained the possession; that afterwards the court quashed the writ of restitution on the ground that the description of the property as set forth in the notice to quit was too vague and indefinite to constitute a legal notice; that it is the purpose of the defendant in the action, on account of the quashing of the writ, to procure an order from the court directing that the possession of the premises shall be taken from the petitioner and restored to the tenant, all of which will be done unless proceedings are stayed. It is also averred that the writ was quashed after leave was given to file an amended complaint and before the same had been filed, heard, or considered by the court. The error assigned is that the court quashed the writ of restitution. The hearing here was upon demurrer to the affidavit of the petitioner.

It is well settled in this state that the relator is not entitled to the writ of review if it has an adequate remedy by appeal. It is contended that, after the writ of restitution has been issued and executed pending the suit, it is not contemplated by the statute that it may be quashed or otherwise disturbed until the final determination of the action; that the bond given on the issuance of the writ is intended to provide full compensation in the event the writ is wrongfully sued out, and that it follows that the court exceeded its jurisdiction when it quashed the writ. The writ of review will not, however, be issued in all cases where the court has exceeded its jurisdiction. It will be issued only in cases where there is no appeal or where, in the judgment of the court, there is not any plain, speedy, and adequate remedy at law. The relator has the remedy of appeal, since the order attacked was one made in the course of the action and may be reviewed on appeal from the final judgment.

It is argued, however, that the remedy by appeal will not be adequate, for the reason that by the quashing of the writ

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Syllabus.

of restitution the possession may be restored to the tenant and the relator thus deprived of the entire fruits of the statutory writ issued *pendente lite*. Bal. Code, § 5534 (P. C. § 1177), provides that the writ may issue when the action is commenced or at any time afterwards. If, therefore, the relator is satisfied with its description in its notice and complaint, it may stand thereon, and on the entry of final judgment it may appeal forthwith. No reason has been pointed out to us why it may not supersede the judgment pending appeal and thus preserve the status as to the possession. Again, if the relator is not satisfied with its complaint, it may avail itself of its leave to amend, and having sufficiently done so, it will be entitled to the writ under the terms of the statute authorizing its issuance at the beginning of the action "or at any time afterwards." It thus appears that the relator is not without adequate legal remedy, for which reason it is not entitled to the writ of review.

The writ is therefore denied.

FULLERTON, ROOT, CROW, and MOUNT, JJ., concur.

[No. 7155. Decided April 4, 1908.]

H. A. FISHER, *Appellant*, v. GREAT NORTHERN RAILWAY COMPANY, *Respondent*.¹

COMMERCE—REGULATIONS—DISCRIMINATIONS—FOREIGN TRAFFIC—CARRIERS. The interstate commerce law, 34 Stat. L. p. 584, requiring the posting and publishing of freight rates and charges applies to shipments from a foreign country to be carried from the port of entry to any place in the United States.

SAME—DISCRIMINATORY CHARGES—AGREEMENTS VIOLATING SCHEDULE. When a freight rate has been fixed and properly posted and published by a carrier with reference to shipments regulated by the interstate commerce law, such rate controls the carrier's charges and lien without regard to a lesser rate agreed to by the carrier, as the latter would be unlawful and unenforceable.

¹Reported in 95 Pac. 77.

SAME—BURDEN OF PROOF. The burden is upon the carrier to show that its shipping contract, fixing a lesser rate than its published schedule, violates the interstate commerce law and is unenforceable, where the carrier asserts the invalidity of the contract and seeks to enforce the higher rate.

COMMERCE — REGULATIONS — DISCRIMINATION—AGREEMENT IN VIOLATION OF INTERSTATE COMMERCE LAW—OCEANIC COMPETITION. Where a railroad's published schedule of rates and charges, posted pursuant to the interstate commerce law, fixed a rate of eighty-five cents per hundred pounds on canned goods from the port of S. in Norway to a station in this state, providing that the ocean rate procurable is such as to allow a minimum rate of seventy-five cents per hundred pounds for rail carriage from Atlantic seaboard ports, and provided further that, if the difference between the through rate and the rail line's minimum of seventy-five cents was less than the ocean proportion, the through rate will be the ocean proportion plus seventy-five cents per hundred pounds, an agreement by the carrier to make the through shipment at the rate of eighty-five cents per hundred pounds is not necessarily in violation of the interstate commerce law, although the best ocean rate procurable at the time was thirty-eight and seven-tenths cents per hundred pounds; and the same may be enforced against the carrier, in the absence of any evidence on its part showing that circumstances and conditions attending oceanic competition did not justify the lesser rate agreed upon; since the burden is upon the carrier to show that the agreed rate is unlawful, and since the rate from the port of entry to the point of destination may lawfully be less in the case of such oceanic competition than it is where the shipment originates in the United States; there being a distinction between such foreign and inland shipments in the application of the interstate commerce law (RUDKIN, J., dissenting).

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 9, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of replevin. Reversed.

Ira Bronson, D. B. Trefethen, and Loren Grinstead, for appellant.

L. C. Gilman (B. O. Graham, of counsel), for respondent.

HADLEY, C. J.—This is an action in replevin, and involves a controversy concerning shipping rates, based upon a dispute

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as to the application of the interstate commerce law. The agreed facts are, that the defendant railroad corporation files with the interstate commerce commission, at Washington, D. C., and prints and keeps open for public inspection, schedules of all the rates, fares, and charges for transportation between different points on its own lines and between points on the lines of any other carrier, by railroad or water, when a through rate has been established; and keeps copies of such schedules plainly printed in large type, for the use of the public, in two public places in every depot, station, and office by it conducted where passengers or freight are received for transportation, in such form that said schedules are accessible to the public and can be conveniently inspected. From the 19th day of May, 1906, continuously to the present time, the defendant has so filed, published, and posted for inspection a schedule of its tariffs in connection with Atlantic steamship lines operating from different ports in Europe, including the port of Stavanger, Norway, to Seattle, Washington. The said schedule names as a rate on canned goods from said Stavanger to Seattle, eighty-five cents per hundred pounds, and on cheese \$1.31 per hundred pounds. The said schedule of tariffs also contains the following provision:

"The rates named herein will be protected only when freight is routed as ordered by a representative of the railroad companies parties hereto and when the ocean rate procurable is such as to allow rail carriers from Atlantic seaboard ports a minimum proportion of seventy-five (\$.75) cents per hundred lbs. If the difference between the through rate published herein and the rail line's minimum proportion of seventy-five (\$.75) cents per hundred lbs. is less than the ocean proportion, the through rate will be the ocean proportion plus seventy-five (\$.75) cents per hundred lbs."

On or about the 20th day of August, 1906, and while said freight tariffs on canned goods and cheese were in existence and applicable to all shipments of canned goods and cheese from said Stavanger, Norway, to Seattle, the plaintiff applied to the defendant's authorized agent at Seattle for quotations

of rates upon canned goods from Stavanger to Seattle, and was verbally informed that the rate was eighty-five cents per hundred pounds, minimum thirty thousand pounds. The above verbal quotation was afterwards confirmed by letter from the agent to the plaintiff. The plaintiff accepted and relied on said quotation of eighty-five cents per hundred for canned goods, notified the defendant of such acceptance, and thereupon purchased in Stavanger, and ordered shipped to Seattle by the defendant's line and its connections, four hundred and eighty-three cases of canned goods, of the weight of thirty-eight thousand seven hundred and thirty-three pounds, and three cases of cheese of the weight of four hundred and sixteen pounds, without prepayment of any of the charges thereon. Said freight was routed as ordered by a representative of the defendant company, and carried by defendant and its connecting rail and water lines from Stavanger to Seattle. At the time the shipment was offered by the plaintiff and received by the defendant, the best ocean rate procurable was thirty-eight and seven-tenths cents per hundred pounds, which, when added to the rail carrier's minimum of seventy-five cents per hundred, according to the aforesaid posted and published condition, made a total tariff of one dollar, thirteen and seven-tenths cents per hundred on the canned goods. The published rate on the cheese was not affected by the condition, and remained at \$1.31 per hundred. In addition to the above, the defendant paid sixty-one cents costs of import bill of lading, and \$1.40 customs charges.

About the 6th day of December, 1906, the goods arrived at Seattle, with freight and customs charges due and unpaid thereon. The carriers of the shipment, other than the defendant, delivered the same to the defendant with freight charges unpaid thereon, and authorized the defendant to collect all freight charges legally due thereon. Upon the arrival of the goods in Seattle, the plaintiff tendered to the defendant at its office in Seattle the sum of \$396.69, which was refused. At the time said tender was made, the defendant

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offered to deliver the goods to plaintiff upon payment of \$447.85, which the plaintiff refused to pay. The defendant retained possession of the goods under claim of carrier's lien thereon, until possession was taken from it by the plaintiff through the medium of this action. From the foregoing facts the court concluded that the defendant, at the time of the commencement of this action, was entitled to possession of the property by virtue of a carrier's lien amounting to the sum of \$447.85, and also to a judgment for the return of the property, or in case the return thereof cannot be had, to a money judgment for said sum. Judgment was entered accordingly, and the plaintiff has appealed.

That the shipment in question, although made from a foreign country to a place in the United States, is subject to the interstate commerce law, is evident from the terms of the law. Section 1 of the act, 34 Stat. at Large, p. 584, provides, among other things, as follows:

"That the provisions of this act shall apply . . . to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are under a common control, management, or arrangement for a continuous carriage or shipment) . . . and also to the transportation, in like manner, of property . . . shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or any adjacent foreign country."

The shipment being subject to the operation of the law, it follows that the provisions in relation to the posting and publishing schedules of rates on such shipments must also apply. Section 2 of the act provides as follows:

"That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate

have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act."

When a rate has been fixed and properly posted and published, within the meaning of the above provisions, it must prevail without regard to any agreement fixing a different rate. In *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 South. 332, 72 Am. St. 936, 43 L. R. A. 385, the court said:

"Whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment of, such amount. Such is now the supreme law, and by it this and the courts of all other states are bound."

The above language was adopted by the supreme court of the United States as expressing its own view of the law. *Tenney & Pac. R. Co. v. Magg*, 202 U. S. 242, 26 Sup. 628. See, also, *Gulf etc. R. Co. v. Hefley*, 158 U. S. 98,

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Sup. Ct. 802; *Texas & Pac. R. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Texas & Pac. R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562.

It is conceded that private contracts for transportation of interstate shipments are ineffective unless a carrier shall have failed to file and post a proper schedule. It is contended by appellant, however, that the schedule must in all respects comply with the provisions of the law before the public is bound by it; that the burden of proving such compliance is upon the carrier; that in the absence of proof of full compliance and of evidence demonstrating that a contract rate is unlawful, the contract is assumed to be valid. In the case of *Southern Pac. R. Co. v. Redding*, 17 Tex. Civ. App. 440, 43 S. W. 1061, a contract in essential respects like the one before us was involved. It related to a shipment from a foreign port to an inland point, and, as in this case, the proportion of the through contract rate, allowed for the carriage from the port of entry to the destination, was less than the rates scheduled for freight originating at such port and carried to such destination. The Texas court said of the company making that contract as follows:

“By making the contract it necessarily affirmed the right to do so, and certainly if it can release itself from its undertaking by proving that the contract was illegal, the burden is upon it to furnish such proof and to show, not simply that the contract may have been unlawful, but that it was necessarily so. In other words, it must exclude the existence of any circumstances or conditions which would have made the contract legitimate.”

It was held that circumstances and conditions might exist which would make the contract legitimate, even under the application of the interstate commerce law; and for want of evidence showing that such circumstances did not exist, the contract rate was enforced. That decision by the state court of Texas was based upon the decision of the supreme court of the United States in *Texas & Pac. R. Co. v. Interstate Com-*

merce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The opinion of the majority of the court in that case, written by Mr. Justice Shiras, is a very exhaustive one. While it was held that the entire commerce of the United States, foreign and interstate, is subject to the provisions of the act of Congress to regulate commerce, yet it was also clearly held that ocean competition may constitute dissimilar conditions, and that circumstances and conditions which exist beyond the seaboard of the United States may be legitimately regarded for the purpose of justifying a difference in rates charged by railroads with respect to import and domestic traffic. It was directly held that competition in ocean transportation is to be taken into consideration when goods have been imported on a through bill of lading from a foreign shipping point in determining whether the contract rate from the port of entry in the United States to the point of destination is a violation of the act. It was declared that the mere fact that the proportion of the through contract rate allowed for the carriage from the port of entry to the destination may be less than the rate scheduled for freight originating at the same place and carried to the same destination, does not necessarily render the lesser rate unlawful. The pronounced view of the court was that it must first be made to appear that the circumstances attending oceanic competition beyond the seaboard of the United States are not such as justify the lesser rate, before it can be held that such rate is unlawful. A clear distinction was thus drawn between the application of the law to oceanic commerce originating in a foreign country for importation to an inland point in the United States and that which is wholly inland and merely interstate. Three judges dissented, and strong reasons were urged by Mr. Justice Harlan and Mr. Chief Justice Fuller against making the distinction between the two classes of commerce. There is much convincing force in the views of the dissenting arguments, but the opinion of the majority constitutes the decision of the court, and inasmuch as the

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question here involved is a Federal one, it must be treated by us in subordination to the views expressed in the decisive opinion. We are not advised that the said decision has been modified in any way by subsequent decisions. All the decisions of the same court cited by respondent relate to purely inland and interstate commerce, and in no way concern oceanic traffic. We therefore deem it to be our duty to follow that decision, as was done by the state court of Texas, and to apply the law as we understand, from the decision discussed, it should be applied to a case of foreign commerce requiring oceanic transportation to a United States port of entry, and thence by inland carriage from such port to the destination. Therefore the scheduled rate is not in itself conclusive as to this class of traffic, and inasmuch as there was no evidence showing that circumstances and conditions attending oceanic competition did not justify the lesser rate, thereby rendering it unlawful, it follows that it has not been demonstrated that the contract was unlawful.

The judgment is therefore reversed, and the cause is remanded with instructions to enter judgment in appellant's favor for the possession of the property, and awarding to respondent the amount tendered into court by the appellant.

FULLERTON, MOUNT, CROW, and ROOT, JJ., concur.

RUDKIN, J. (dissenting)—It seems to me that the conclusion reached by the majority of the court is neither warranted by the provisions of the act to regulate commerce nor supported by the authorities cited. Section 1 of that act expressly declares that its provisions shall apply to the transportation of property shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. It is needless to say that the traffic here involved falls directly within this provision. Indeed, the appellant does not contend otherwise. Nor in my opinion does the court hold in the case of *Texas & Pac. R. Co. v. Interstate*

Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, that the transportation of goods partly by water and partly by rail from a foreign country to any place in the United States is a mere matter of private contract between the carrier and the shipper. The court there held that dissimilarity of conditions may warrant a railroad company in carrying imports from a port of entry at a less rate than domestic goods, but this in my opinion falls far short of holding that the transportation of imports is a mere matter of private contract. In *Texas & Pac. R. Co. v. Interstate Commerce Commission*, *supra*, the court said:

"It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce [excepting commerce wholly within a state] as well that between the states and territories as that going to or coming from foreign countries."

In *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, the court said:

"That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act . . . And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law."

If the act covers the whole field of commerce, as well that between the states and territories as that going to or coming from foreign countries, and its chief aim is to prevent unjust discrimination and undue preference by placing on the carrier the positive duty to establish schedules of reasonable rates which shall have a uniform application to all and which cannot be departed from so long as the established schedules remain unaltered in the manner provided by law, how can the

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Statement of Case.

right of private contract exist without defeating the very objects that Congress had in view. While under the decision in *Texas & Pac. R. Co. v. Interstate Commerce Commission*, *supra*, a railroad may discriminate between imports and domestic shipments where dissimilar conditions warrant such discrimination, it may not discriminate between different importers, and while the rate on imports may be less than the rate on domestic goods, the rates must be uniform as to each class. There must be no unjust discrimination or undue preference, and the schedule of such rates must be filed and published and can only be changed in the mode prescribed by law.

If there is any merit in the appeal before us, in my opinion it lies in the fact that the schedules posted and filed were not sufficiently definite and explicit to comply with the requirements of the law. But inasmuch as this question is not touched upon in the majority opinion, I will refrain from discussing it.

[No. 6871. Decided April 4, 1908.]

Amos WILCOX, Respondent, v. KATIE WATSON, Appellant.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence by a trial judge who heard and saw the witnesses will not be disturbed on appeal when sustained by the evidence and there is nothing in the record to justify any modification.

Appeal from a judgment of the superior court for Spokane county, Hunke, J., entered January 9, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of forcible entry and detainer. Affirmed.

Scott & Campbell, for appellant.

Roche & Onstine, for respondent.

¹Reported in 94 Pac. 1135.

PER CURIAM.—This is an action of forcible detainer, prosecuted by the plaintiff, Amos Wilcox, against the defendant, Katie Watson, to recover possession of the two upper floors and basement of a business block in the city of Spokane, upon which plaintiff held a lease from the owners. There was a lodging house in the two upper floors, which had been provided with furniture purchased under a conditional bill of sale. About April 30, 1906, the plaintiff sublet the basement, lodging house, and furniture to the defendant, who agreed to pay all installments of purchase money on the conditional bill of sale, as they matured, to pay rent to the owners of the building, to run the lodging house, and to receive the profits, and in the absence of any default was to have an option to purchase the lease, lodging house, and furniture at a stipulated price at any time prior to May 1, 1907. The plaintiff, claiming the defendant had failed to make the payments as agreed, gave written notice terminating her tenancy, and commenced this action, in which he obtained immediate possession under a writ of restitution. On final trial, findings of fact, conclusions of law, and a judgment were entered in favor of the plaintiff. The defendant has appealed.

The only issue on this appeal is whether the evidence sustains the findings and judgment. There is a dispute between the parties as to the exact nature of the contract, as to the validity of certain alleged liens on the furniture, and as to whether any default had been made by the appellant. We have carefully examined all the evidence, and conclude that it sustains the findings made by the trial judge, which in turn sustain the final judgment. No good purpose will be served by stating the evidence in detail, although much conflict existed. The trial judge saw the witnesses, heard them testify, and passed upon their credibility. We find nothing in the record to justify us in modifying the findings which he has made.

The judgment is affirmed.

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Statement of Case.

[No. 7010. Decided April 4, 1908.]

J. C. MILLER, *Appellant*, v. C. DENMAN *et al.*, *Respondents*.¹

CORPORATIONS—SUBSCRIPTIONS TO STOCK—LIABILITY OF INCORPORATORS UPON ABANDONMENT—TRUST COMPANIES. Under Laws 1903, p. 367, prohibiting a trust company from doing business until all its capital stock is subscribed and paid in, the original incorporators are liable to a subscriber for the amount paid on his subscription upon their abandonment of the enterprise for failure to secure full subscriptions of the stock, regardless of fraud or conspiracy in the soliciting of the subscription, and although the same was solicited by and paid to only one of their number.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—RATIFICATION OF AGENT'S ACT. Where the incorporators of a trust company abandon the enterprise because of inability to secure subscriptions to the stock, a paid up subscriber to the stock does not, as a matter of law, ratify the unauthorized investment of his money in a state bank by reason of failing to promptly object, but the same is a question for the jury, where it appears that the subscriber was a farmer, unacquainted with business methods, that the secretary of the trust company, in the letter inclosing stock of the state bank, falsely represented that such investment was only temporary and for the purpose of paying a dividend until incorporation of the trust company, subscriptions to which would be solicited until they could complete organization and take over the business of the bank; since full knowledge of material facts is essential to ratification.

SAME. In such a case, the subscriber would not be compromised by his election, against his protest, to the office of director and vice president of the trust company.

SAME—EVIDENCE OF RATIFICATION. Upon an issue as to the ratification of an unauthorized investment of plaintiff's money in bank stock, which plaintiff had not promptly returned on receipt, plaintiff may show that the certificate delivered was an overissue, and also that a portion of his money represented to be invested in the stock had been used to start a small bank in another town, he having no knowledge of such facts at the time.

WITNESSES—EXAMINATION—UNWILLING WITNESS. Liberality should be allowed upon the examination of unwilling witnesses called to testify against their own interests.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 29, 1907, upon grant-

¹Reported in 95 Pac. 67.

ing a nonsuit, dismissing an action to recover money paid on a subscription for corporate stock, after a trial before the court and a jury. Reversed.

Belt & Powell, for appellant.

Samuel R. Stern, A. G. Gray, S. P. Domer, and *Allen & Allen*, for respondents.

CROW, J.—This action was commenced by J. C. Miller to recover \$2,000 paid on a subscription for twenty shares of capital stock in the German-American Trust Company of Spokane. On January 27, 1906, the defendants C. Denman, W. W. Parry, C. E. Clure, E. W. Swanson, J. L. Foskett, W. S. Foster, J. F. Kunz, and one Abram E. Sever, executed and acknowledged an organization certificate for the German-American Trust Company of Spokane, with \$100,000 capital stock, under chapter 176, Laws 1903, page 367, known as the "trust company act." On the same date the incorporators, as a first board of directors, organized, adopted by-laws, elected officers, and authorized the defendants E. W. Swanson and C. E. Clure, respectively elected secretary and assistant secretary, to solicit and collect the required subscriptions of capital stock. In the performance of this duty Clure procured from the plaintiff, Miller, two subscriptions of \$500 and \$1,500, which the plaintiff paid. The incorporators were unable to obtain full subscriptions, and the organization of the trust company was never perfected. The plaintiff sued all of the incorporators except Abram E. Sever, and also joined as defendant one James McCann, who was not served and did not appear, but who seems to have been interested in the organization although not an incorporator. The plaintiff's contention was that the defendants, instead of returning his subscription money, had, without authority, appropriated and diverted it to another purpose. On a jury trial a nonsuit was granted, and a judgment was entered dismissing the action. The plaintiff has appealed.

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The appellant in his complaint made allegations of fraud and conspiracy. He also alleged facts sufficient to sustain an action for conversion. The respondents separately answering denied all allegations of fraud and conspiracy, but affirmatively alleged that the respondents Clure, Foskett, and Swanson had invested appellant's money in capital stock of the State Bank of Washington; that he was promptly notified of such investment, and that by his failure to object thereto, he ratified and approved the same. The appellant in substance contends that the respondents are each and all of them personally liable for the amount of his subscription, even though it be conceded that he has failed to show conspiracy or fraud; that the trial court erred in rejecting evidence offered, and that it also erred in granting the nonsuit and dismissing the action. There was evidence that the respondent C. E. Clure solicited stock subscriptions for the German-American Trust Company, and that on February 14, 1906, the appellant first subscribed and paid \$500 for five shares, at which time Clure delivered to him the following receipt:

"German-American Trust Company,
"Spokane, Wash., Feby. 14, 1906.

"Received of J. C. Miller Five Hundred Dollars in payment of five shares of the capital stock of the German-American Trust Company. Certificate for same to be issued as soon as received—not later than 90 days from date hereof.

"German-American Trust Company,
"C. E. Clure, Assistant Secy."

As no business could be transacted by the proposed corporation until the \$100,000 of capital had been fully subscribed and paid, this receipt indicated that the organization was to be sufficiently perfected within ninety days to require an issue of all the capital stock. There was further evidence that, before the appellant made any additional subscription, the respondents elected him director and vice president of the proposed German-American Trust Company, although he was then ineligible, not being entitled to stock to the amount of

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\$1,000 par value; that he declined to act as such vice president or director, claiming he was incompetent, being a German farmer unfamiliar with business transactions and unable to write the English language; that he never did act or qualify as director or vice president; that the defendants without his authority printed his name as vice president on letterheads of the proposed trust company; that afterwards, on March 3, 1906, the appellant subscribed for fifteen additional shares of stock, and paid Clure \$1,500, for which Clure delivered another receipt; that Clure told appellant he could sell all the stock in the city of Spokane, but that the organizers wanted some farmers to be interested in the trust company; that the respondents were unable to obtain subscriptions for more than \$12,000 of the capital stock; that they collected on such subscriptions \$6,000 in cash and \$6,000 in good notes; that on or about March 10, 1906, the respondents Clure, Foskett, and Swanson, without any authority from the other respondents or from appellant, invested the \$12,000 cash and notes in a corporation known as the "State Bank of Washington;" that the following letter was mailed to, and received by, the appellant Miller:

"Spokane, Wash., March 10, 1906.

"Mr. J. C. Miller,

"Dear Sir,—Owing to delay in securing the full \$100,000 capital stock required by the German-American Trust Company, we have decided to commence business as a State Bank. And for that purpose have taken over the State Bank of Washington and herewith hand you a certificate of stock for twenty shares, being the amount of your subscription in the German-American Trust Company. We do this to enable us to use the capital so that we can pay you a dividend at the close of the year. We will continue to solicit stock in the G. A. T. Co. and when the full amount is secured will open for business under that name, and will take over the business acquired through the operation of the State Bank of Washington. Assuring you that we are working for the best interests of all concerned and with the idea that in the future we will be able to launch the 'German American Trust Com-

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pany' under the most favorable conditions we desire your most hearty co-operation.

"Trusting this will meet with your approval, we are,
"Very truly yours, C. E. Clure, Cashier."

that like letters were mailed to all the other subscribers, including some of the respondents; that in fact the cash and notes were not turned over to the State Bank of Washington for several days after March 10, 1906; that the appellant made no answer to the letter, neither did he return the bank stock; that the State Bank of Washington was organized in May, 1905; that it did business as such for about two months; that its business was transferred to and conducted by the People's Bank, which was managed by the respondent Swanson and his brother; that while the People's Bank was in business, the State Bank of Washington received no deposits; that about March 15, 1906, the State Bank of Washington, being reorganized, again commenced business; that the appellant's money was then turned over to it; that about one month later it suspended and passed into the hands of a receiver, and that shortly thereafter the appellant demanded his money from the respondents, and commenced this action.

Chapter 176, Laws 1903, p. 367, is an act relating to trust companies. Section 2 provides for the execution of a certificate of organization by not less than seven persons mentioned in § 1. These persons, under § 5, constitute the first board of directors. Sections 1 and 3 provide that, before the corporation shall be authorized to transact business, the capital stock shall be fully paid and the secretary of state shall issue to the company a certificate of authority. From these and other provisions it is evident that the organization would not be complete until all conditions precedent in the act required had been performed and the certificate of the secretary of state had been issued. Necessarily subscriptions and payments of capital stock could only be solicited and received by the original incorporators who constituted the first board of directors, or by their duly authorized agents. They were author-

merce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The opinion of the majority of the court in that case, written by Mr. Justice Shiras, is a very exhaustive one. While it was held that the entire commerce of the United States, foreign and interstate, is subject to the provisions of the act of Congress to regulate commerce, yet it was also clearly held that ocean competition may constitute dissimilar conditions, and that circumstances and conditions which exist beyond the seaboard of the United States may be legitimately regarded for the purpose of justifying a difference in rates charged by railroads with respect to import and domestic traffic. It was directly held that competition in ocean transportation is to be taken into consideration when goods have been imported on a through bill of lading from a foreign shipping point in determining whether the contract rate from the port of entry in the United States to the point of destination is a violation of the act. It was declared that the mere fact that the proportion of the through contract rate allowed for the carriage from the port of entry to the destination may be less than the rate scheduled for freight originating at the same place and carried to the same destination, does not necessarily render the lesser rate unlawful. The pronounced view of the court was that it must first be made to appear that the circumstances attending oceanic competition beyond the seaboard of the United States are not such as justify the lesser rate, before it can be held that such rate is unlawful. A clear distinction was thus drawn between the application of the law to oceanic commerce originating in a foreign country for importation to an inland point in the United States and that which is wholly inland and merely interstate. Three judges dissented, and strong reasons were urged by Mr. Justice Harlan and Mr. Chief Justice Fuller against making the distinction between the two classes of commerce. There is much convincing force in the views of the dissenting arguments, but the opinion of the majority constitutes the decision of the court, and inasmuch as the

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question here involved is a Federal one, it must be treated by us in subordination to the views expressed in the decisive opinion. We are not advised that the said decision has been modified in any way by subsequent decisions. All the decisions of the same court cited by respondent relate to purely inland and interstate commerce, and in no way concern oceanic traffic. We therefore deem it to be our duty to follow that decision, as was done by the state court of Texas, and to apply the law as we understand, from the decision discussed, it should be applied to a case of foreign commerce requiring oceanic transportation to a United States port of entry, and thence by inland carriage from such port to the destination. Therefore the scheduled rate is not in itself conclusive as to this class of traffic, and inasmuch as there was no evidence showing that circumstances and conditions attending oceanic competition did not justify the lesser rate, thereby rendering it unlawful, it follows that it has not been demonstrated that the contract was unlawful.

The judgment is therefore reversed, and the cause is remanded with instructions to enter judgment in appellant's favor for the possession of the property, and awarding to respondent the amount tendered into court by the appellant.

FULLERTON, MOUNT, CROW, and ROOT, JJ., concur.

RUDKIN, J. (dissenting)—It seems to me that the conclusion reached by the majority of the court is neither warranted by the provisions of the act to regulate commerce nor supported by the authorities cited. Section 1 of that act expressly declares that its provisions shall apply to the transportation of property shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. It is needless to say that the traffic here involved falls directly within this provision. Indeed, the appellant does not contend otherwise. Nor in my opinion does the court hold in the case of *Texas & Pac. R. Co. v. Interstate*

and give him stock therein to the amount of \$10,000, and they did nothing of the kind. They certainly cannot keep the plaintiff's money in those circumstances. Their want of success in the formation of the company is no concern of the plaintiff, and it is no defense in this action."

In *Alger on the Law of Promoters and the Promotion of Corporations*, § 162 reads as follows:

"When a subscriber for shares in a projected corporation has paid money thereon in advance to the promoters, and the scheme proves abortive, he may recover back his money. This right rests on the failure of the consideration on which the money was paid. But the scheme is not to be deemed abortive until the formation of the corporation has been abandoned or has become impracticable, or a reasonable time for the formation has elapsed. It is reasonable, in the absence of agreement to the contrary, that the expense of exploiting the proposed undertaking should, in case it collapses, fall upon the original projectors, and not on those who advanced their money on the faith of the ability of the projectors to do that which they undertook to do."

See, also, 10 Cyc. 265; 1 Cook, *Corporations* (5th ed.), § 63.

We think the principles announced in the above authorities apply with especial force to the facts of this case, and that the defendants, as original directors occupying a position kindred to that of promoters, would be liable to the plaintiff for the return of his subscription even though they have been guilty of neither fraud nor conspiracy. There was sufficient evidence of their negligence, breach of trust, and failure of duty to require the question of their liability to be submitted to the jury.

The respondents contend that the appellant ratified the investment of his money in the State Bank of Washington by the defendants Clure, Foskett, and Swanson, and that he is now estopped from claiming its return. He was not familiar with the business methods of bank or trust companies. He was a plain German farmer, living in Idaho some distance from Spokane. He subscribed and paid for the stock, relying upon assurances of Clure that the investment would prove

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profitable. His failure to promptly return the bank stock should be viewed more liberally than the failure of a business man shown to be well versed in such matters. The evidence does not show that the appellant fully understood the investment. The letter from Clure, inclosing the bank stock, gave him no information as to the solvency, business standing, or capital stock of the State Bank of Washington. He was never advised as to its true condition or situation. Mr. Clure stated that the trust company had already determined to take over the State Bank of Washington, and that the certificate for its stock which he inclosed had already been issued. Clure afterwards testified on the trial of this action that nothing of the kind had been done. Mr. Clure's letter further stated that the action had already been taken to enable the payment of a dividend to the appellant; that further subscriptions of stock would be thereafter solicited by the German-American Trust Company, and that when the full amount was obtained the trust company itself would take over the business of the State Bank. To the ordinary farmer this would indicate that the trust company enterprise had not been abandoned, but that it was to be fully perfected, and that he would ultimately obtain the stock for which he had subscribed and made payment. The evidence, however, shows that no further subscriptions were solicited or obtained.

"Knowledge of all material facts and circumstances is an essential element to an effective ratification; without such knowledge the adoption of the acts of an unauthorized agent, or one who has exceeded his authority, will not bind the principal; but on the contrary, if he has given his assent while in ignorance of the facts of the case, he may on being informed, disavow the unauthorized transaction." 1 Am. & Eng. Ency. Law (2d ed.), 1189.

Mr. Clure's letter did not advise appellant of all the facts and circumstances pertaining to the disposition of his money. The appellant is in no manner compromised by the fact that the respondents, against his protest, pretended to elect him director and vice president of the German-American Trust

Company. It appears that some one, without his knowledge or consent, also attempted to elect him to some office in the State Bank of Washington. He never qualified, nor did he act in any official capacity in either corporation. We cannot hold, as a matter of law, that the appellant ratified the unauthorized acts of Clure, Foskett, and Swanson, thereby relieving them and the other respondents from personal liability. In all probability he would not have approved their acts had he been fully advised of all the facts and circumstances pertaining to the investment of his money. It was within the exclusive province of the jury to determine from all the evidence whether there was any ratification by him sufficient to relieve the respondents from liability.

"Although it is said that the conduct of the principal will be liberally construed in favor of a ratification or adoption of the acts of the agent, yet a ratification is not to be presumed from a doubtful state of facts, but the question should be left to the jury." 1 Am. & Eng. Law (2d ed.), 1195.

The trial court refused to permit the appellant to show that the stock in the State Bank of Washington which had been delivered to him was an overissue. We think this was prejudicial error. If the stock was an overissue there was no investment of appellant's money which he could afterwards ratify. The court also refused evidence offered by appellant tending to show that a portion of the subscription money paid by himself and others had been used to start a bank in a small town some distance from Spokane. This evidence should have been admitted as tending to show a breach of trust and lack of good faith on the part of the respondents. We will not pass on all of the contentions made by appellant in the matter of the rejection of evidence. He pleaded conspiracy and fraud, which he was entitled to prove if he could do so. He was compelled to call the respondents to testify in his behalf. They were not only unwilling witnesses, but their interests were adverse to his. Under such circumstances much liberality should have been allowed him in conducting their examination. With-

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out regard to evidence erroneously excluded, enough was actually admitted to entitle the appellant to have the issue of the liability of each and all of the respondents, and also the issue of ratification, submitted to the jury for their determination.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., Root, Mount, and FULLERTON, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

[No. 7029. Decided April 6, 1908.]

FARMERS & MECHANICS BANK, *Appellant*, v. ROBERT E. STRAHORN, *Defendant*, B. C. MOSBY, *Intervener*,
*Respondent.*¹

FRAUDULENT CONVEYANCES—BY INSOLVENT CORPORATION—LIABILITY OF ASSIGNEE—DEFENSES—PAYMENT OVER TO CREDITOR—BANKS. Where a bank was a creditor, and also held for collection the claim of another creditor, of an insolvent corporation, and the corporation made a void assignment to the bank with the understanding that from the moneys received the bank should pay itself and the other creditor the amount of their claims, the bank is not liable to the receiver of the corporation for the amount of collections made by it, where it appears that the sum collected was only sufficient to pay the indebtedness of the other creditor and had all been paid over to and applied upon the indebtedness of the other creditor.

Cross-appeals from a judgment of the superior court for Spokane county, Huneke, J., entered July 3, 1907. Action upon an account assigned to plaintiff by an insolvent corporation, the proceeds of which account were to be applied by the assignee to discharge certain indebtedness of the corporation. The receiver of the corporation intervened, claiming the account and proceeds as trust fund assets of the cor-

¹Reported in 94 Pac. 1090.

poration. Judgment in favor of the intervener, against the plaintiff for moneys received on the account, without allowance for interest, and against the defendant for the balance uncollected and due on the account. Plaintiff appeals from the portion of the judgment against it, and intervener appeals from the disallowance of interest. Reversed on plaintiff's appeal.

Merritt, Oswald & Merritt, for appellant, contended, among other things, that the assignment was made in good faith and is not vitiated by subsequent developments. *Brooks v. Skookum Mfg. Co.*, 9 Wash. 80, 37 Pac. 284. Payment to a creditor is not forbidden. *Dutcher v. Importers & Traders' Nat. Bank*, 59 N. Y. 5.

B. C. Mosby, pro se, contended, *inter alia*, that a fraudulent assignee may be personally charged for the funds received and misapplied. 28 Am. & Eng. Ency. Law (2d ed.), 1120, 1121; *Chicago etc. Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727.

ROOT, J.—On May 19, 1906, the intervener was appointed receiver of the Spokane Columbia River Railroad and Navigation Company, a corporation organized under the laws of Washington. This company, which we will designate herein as the railroad company, was organized with a capital stock of four million dollars, all of which was subscribed. About fifty shares (one hundred dollars each par value) were sold and issued to different parties, in payment for which conditional notes were received payable when the railroad should be constructed. Additional stock to the amount of \$30,000 was sold to apparently responsible parties, but not paid for. The railroad company made a contract of sale on the 16th of March, 1906, to one C. S. Eltinge, wherein it sold all its property, except its evidences of indebtedness and office fixtures for the sum of \$37,977.98. Eltinge was acting merely

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as agent for defendant Strahorn. The railroad company had a large indebtedness at this time.

The court found that there was due at the time of the trial from defendant Strahorn, by reason of the contract above mentioned, the sum of \$13,000. In March, 1906, the railroad company assigned, or attempted to assign, all of its interests in, to, and under said contract to the appellant, Farmers & Mechanics Bank, the trial court finding that the assignment was made "with the understanding and agreement and upon the condition" that from the money received thereon plaintiff should pay the indebtedness due itself and the Farmers Grain & Supply Company. To this finding no exception was taken by intervener. Under this assignment the bank received from Strahorn the sum of \$19,891.19, which money appears to have been credited upon the indebtedness of the railroad company to the Farmers Grain & Supply Company, which claim the bank had for collection. At this time the railroad company was indebted to the plaintiff bank in the sum of \$10,500, and to the Farmers Grain & Supply Company in the sum of \$19,800. This action was brought against defendant to recover on this indebtedness due plaintiff. The receiver intervened and contended that the railroad company was insolvent at the time it made the assignment of the contract to the bank, and that said assignment was void for the reason that it was not executed in the manner provided by law, and also that it was made at a time when the railroad company, by reason of its insolvency, could not legally make said assignment, as the same would be and amount to an unlawful preference to one of its creditors and against the rights and interests of other creditors. The assignment was first attempted to be made to plaintiff by an instrument worded as follows: "We hereby assign all our rights, title, and interest in the above contract to the Farmers & Mechanics Bank of Spokane, Washington. Signed. Williard S. Foster, V. P. F. W. Swanson, Sec. March 17, 1906." This was executed by Swanson, acting

for himself and under a power of attorney from Foster. The intervenor urges that this assignment was absolutely void on account of the insolvency of the railroad company, and for the further reason that Foster as vice president or trustee could not delegate his authority to secretary Swanson.

On the 29th of March the railroad company by a more formal instrument made an assignment of the contract to appellant bank, wherein it authorized the bank to take any and all steps necessary to collect the amount due on said contract. There were at this time numerous other creditors. There is much dispute as to the amount of the indebtedness and assets, the court finding that the entire liabilities were "ostensibly \$68,813.96 and its entire assets only \$32,977.88." The amount of assets thus found does not, however, include \$25,-000 of unpaid subscriptions due from subscribers whom the court found to be "apparently financially responsible." Appellant contends that the indebtedness did not exceed \$33,040, and that its assets were greater than its liabilities.

The trial court found that the railroad company was insolvent when it made the assignment of the contract to the bank, and that the assignment was void, and entered a decree directing Strahorn to pay into the registry of the court the \$13,000 due upon the contract, and entered judgment in favor of the receiver, intervenor, and against the plaintiff for the \$19,891.19 received by it under the assignment of the contract. The trial court found that all of the assets of the railroad company were, at the time of the assignment, a trust fund for the benefit of its creditors, and should be ratably distributed. The appellant bank maintains that the assignment was valid, that the railroad company was not insolvent, and that the assignment should not have been set aside, and that there would have been no necessity for setting it aside or calling for a refund of money received thereunder if the railroad company or the receiver had collected the unpaid subscriptions to the capital stock. The bank also claims that no judgment could run against it for the money received under the

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assignment of the contract, inasmuch as it received said money not for its own use and benefit, but as agent for the Farmers Grain & Supply Company, to which it paid the money.

While there is a conflict in the evidence, and it is of such a character that different opinions might possibly be entertained as to the insolvency of the railroad company at the time of the assignment, we are unable to say from the record that the trial court's finding of insolvency is not justified, and we will not disturb its action in holding the assignment void and directing the payment by defendant Strahorn of the \$13,000 into the registry of the court. We do not think, however, that the judgment of \$19,891.19, or any part thereof, can be upheld as against the appellant bank. The trial court found that practically this amount of money was due the Farmers Grain & Supply Company from the railroad company, and that the bank held this claim for collection, it being then past due and wholly unpaid, and that said money so received by the bank was credited upon its indebtedness and that of the railroad company to the Farmers Grain & Supply Company—not specifying any amount to each.

These findings were not excepted to by the intervener, and must therefore be accepted as facts as against him by this court. The evidence shows that this money was applied to the indebtedness of the Farmers Grain & Supply Company. The court also found that, in addition to the indebtedness paid by the \$19,891.19, there remained due and unpaid to plaintiff the sum of \$10,500. This finding, which is not excepted to by intervener, in the light of the other findings, shows that all of the \$19,891.19 must have been applied to the indebtedness of the Farmers Grain & Supply Company and none to the indebtedness of plaintiff. Under these circumstances the bank could not be made responsible for the money so received and paid over to that company.

The judgment of the honorable superior court is reversed, and the cause remanded with directions to that court to

modify its decree and judgment by eliminating that portion allowing a recovery against the appellant bank.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

[No. 7001. Decided April 8, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Patrick Foley, Respondent, v. HILLYARD WATER COMPANY, Appellant.*¹

WATERS AND WATER COURSES—PUBLIC SUPPLY—RIGHTS OF PRIVATE CONSUMERS—REGULATIONS. Where the owners of premises, supplied with water by a private service which was unsatisfactory and unsuitable for permanent use, petitioned a public service corporation to extend its service to his property, and the water company, while extending its mains at great expense, purchased and temporarily used the private system until the new service was ready, the owner cannot insist upon a continuance of the old private service, or to a supply through the new service, without the payment of the cost of making connections, as charged to other customers of the water company under reasonable rates and regulations.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 27, 1907, granting a mandate to compel a water company to furnish water to a patron, after a trial on the merits before the court without a jury. Reversed.

Gallagher & Thayer, for appellant.

J. M. Geraghty and Alex M. Winston, for respondent.

CROW, J.—This action is based upon an application of the relator, Patrick Foley, for a writ of mandamus to compel the defendant, the Hillyard Water Company, to furnish him water for domestic purposes. The relator alleges, that the de-

¹Reported in 94 Pac. 1080.

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fendant is a public service corporation, with authority to install a system of water works and sell water to the public; that it has a franchise over certain streets in the town of Hillyard, in Spokane county; that it has a water main on Harrison street, fronting upon which the relator owns a home where he resides with his family; that heretofore he caused his premises to be connected with the Harrison street main; that he was furnished water therefrom until April 8, 1907, at which time the defendant, without cause and for the purposes of oppression, cut off his water supply; that it has refused to supply him with water on the same terms as its other customers; that he has tendered the water rent in advance, and that he is wholly dependent on the defendant for a water service. The trial judge made findings in favor of the relator, and entered a judgment awarding a writ of mandamus to compel the defendant to furnish him with water through the Harrison street main. The defendant has appealed.

The evidence shows that respondent's property is in the southwest corner of a platted block bounded by Arthur street on the north, Harrison street on the east, and Twenty-first street on the south; that his lots front on Harrison and Twenty-first streets; that the appellant never laid any water main on either Arthur or Harrison street; that some years since, one Taylor owned a water system from which he sold water to respondent and other consumers; that an old wooden main running east and west on Arthur street was a part of his system, from which certain private parties extended a supply pipe down Harrison street; that the respondent had connected his property therewith, and was being supplied with water by Taylor; that the service provided by Taylor was unsatisfactory; that the appellant corporation owned another water system in the same neighborhood, but had no mains on any of the streets above mentioned adjacent to the block in which respondent lived; that many residents and consumers on Twenty-first street, including the respondent, petitioned the appellant to extend a main from its system along Twenty-

first street to supply them with water; that, in consideration of the petitioners' promise of patronage, the appellant did so, incurring much expense; that the other petitioners connected with this new main; that Taylor thereupon disposed of his old system to the appellant, who temporarily furnished water through the same along Arthur and Harrison streets until it could complete its new main along Twenty-first street; that appellant abandoned the old Taylor main in Arthur street after the new main was installed and ready for use; that respondent refused to connect his property with the new main because the appellant required him to pay the sum of \$5.50, the actual cost of making such connection; that other consumers making the connection had paid that sum; that respondent would incur some additional expense for the extension of pipes from such new connection to his buildings; that the appellant offers to furnish him with water through its new main on Twenty-first street if he will pay such actual cost of connection, which he refuses to do, insisting that the appellant shall supply him with water through the old Arthur street main, and the extension therefrom on Harrison street.

The appellant contends, (1) that it has not discriminated against the respondent; (2) that the respondent is wrongfully seeking to compel it to operate the abandoned Taylor system; and (3) that Taylor, not being a public service corporation, could not have been compelled to operate the old system, and that appellant cannot now be compelled to do so.

All of these contentions should be sustained. The respondent having petitioned for the extension of appellant's main along Twenty-first street, is now in no position to insist that he shall be supplied with water through an old main of the Taylor system which the evidence shows is not suitable for permanent use but has been abandoned. The appellant is ready, willing, and able to supply respondent with water through its new main installed upon respondent's petition, on the same terms and conditions that it is supplying its other customers. Its rules and regulations are not shown to be arbi-

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trary or unreasonable. If respondent complies with them he will receive an abundant supply of water. He and other consumers having regarded the old Taylor system as deficient and unsatisfactory, petitioned for water through appellant's system. Respondent could not have compelled Taylor to continue his supply of water, through the old system, and it would be an injustice under the facts now shown to compel appellant to do so.

The judgment is reversed, and the cause is remanded with instructions to dismiss the action.

HADLEY, C. J., FULLERTON, MOUNT, and Root, JJ., concur.

[No. 6923. Decided April 8, 1908.]

CHARLES F. STOKES *et al.*, *Appellants*, v. C. F. CURTIS *et al.*,
Respondents.¹

BOUNDARIES—ASCERTAINMENT—EVIDENCE—SUFFICIENCY. There is sufficient evidence of the location of a disputed boundary line, the starting point of which was given as the center of F. street in a town plat, 823.5 feet north of a certain government corner, where it appears that the center of F. street is 823.5 feet north of the center of S. street, as given by the plat, the accuracy of the plat not being disputed, and that the government stake originally stood in the center of S. street, although it has long since disappeared.

SAME—DESCRIPTION—CALLS—DISCREPANCIES. Where a description first calls for the north boundary of the tract as at the center of a street, and runs thence south a certain number of feet to a railroad right of way for the south boundary, the first call prevails over the last call in determining the location of the north boundary, where there is a shortage between the two boundaries.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 4, 1907, upon findings in favor of the defendants, after granting a nonsuit in an

¹Reported in 94 Pac. 1083.

action to recover the possession of real property, and to quiet title. Reversed.

H. S. Stoolfire and Lloyd E. Gandy, for appellants.

Peacock & Ludden, for respondents.

CROW, J.—This is an action to recover possession of a strip of land thirty feet in width by five hundred in length, the title to which is claimed by the plaintiffs, Charles F. Stokes and Sarah A. Stokes, his wife, and from which they allege they have been unlawfully ousted by the defendants, C. F. Curtis and Amelia M. Curtis, his wife. A nonsuit having been granted, the trial judge made findings of fact, and entered a decree in favor of defendants. The plaintiffs have appealed.

The only question before us is whether the appellants were entitled to a denial of the motion for a nonsuit. They own a tract of land immediately north of one owned by the respondents. Both parties claim title through the partition of one entire tract made by the superior court of Spokane county in an action wherein C. E. Nosler was plaintiff and Maggie A. Nosler, Myrtle C. E. Nosler, and Hale R. Nosler were defendants. The evidence shows that by such partition the following tract was decreed to Hale R. Nosler, from whom appellants derive title:

“Beginning at a point on the west line of the west half (W. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section thirteen (13), township twenty-five (25) north, of range forty-three, east of the Willamette Meridian, eight hundred and twenty-three and five-tenths (823.5) feet north of the southwest corner of the southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of said section, said point being in the center of First street in said ‘East Spokane,’ thence north five hundred and sixty-one and five-tenths (561.5) feet, more or less, to the center of Second street in said ‘East Spokane,’ thence east eighty (80) rods, more or less, to the east line of said west half (W. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of said section, thence south five hundred and sixty-one and

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five-tenths (561.5) feet to a point east of the place of beginning, thence west eighty (80) rods, more or less, to the place of beginning."

That the following tract was decreed to Myrtle C. E. Nosler from whom the respondents deraign title:

"Beginning at a point on the west line of the southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section thirteen (13), township twenty-five (25), north of range forty-three (43), east of the Willamette Meridian, two hundred and ninety-two (292) feet north of the southwest corner of said southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), thence north five hundred and thirty-one and five-tenths (531.5) to the center of First street as shown by the plat of 'East Spokane,' thence east eighty (80) rods, more or less, to the east line of said southwest quarter (S. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$), thence south five hundred and thirty-one and five-tenths (531.5) feet, more or less, to the right of way of the Washington and Idaho Railroad Company, thence west on the north line of said right of way eighty (80) rods, more or less, to the place of beginning."

That the line between these tracts is in dispute, the same being the south line of appellants' and the north line of respondents' land, and that respondents have fenced and taken possession of a strip which they claim to be their north thirty feet, but which the appellants claim to be their south thirty feet.

An examination of the descriptions above set forth clearly shows that a line extended east from the center of First avenue in East Spokane is the true dividing line; that all land north thereof belongs to the appellants, and that all south thereof belongs to the respondents. A nonsuit having been granted, we are called upon to determine, (1) whether the appellants' evidence was sufficient to show the exact location of this line, and (2) whether the respondents have wrongfully taken possession of any land north thereof.

The record shows that the partitioned land was immediately east of, and adjacent to, an addition known as East Spokane, in which First and Second streets were platted and located; that a copy of the official plat of East Spokane was ad-

mitted in evidence; that its verity was not questioned; that the United States government stake at the southwest corner of the southwest quarter of the southeast quarter of section 13, 25, 43, had been originally at a point in the center of what is now the intersection of Sprague and Cleveland streets in the city of Spokane, although the original stake has long since disappeared; that the description of respondents' land commenced at a point on the west line of the southwest quarter of the southeast quarter of section 13, two hundred and ninety-two feet north from this stake; that his west line runs thence north five hundred and thirty-one and five-tenths feet to the center of First street as shown on the plat of East Spokane; that the center line of First street extended east is respondents' north boundary; that the description of appellants' land commences at a point on the west line of the west half of the southeast quarter of section 13, eight hundred and twenty-three and five-tenths feet north of the stake at a point in the center of First street, and extends north five hundred and sixty-one and five-tenths feet to the center of Second street in East Spokane; that their land is therefore located between a line extended east from the center of First street as their south boundary and a line extended east from the center of Second street as their north boundary; that the distances on the plat of East Spokane, the accuracy of which is not disputed, show the center of First street to be eight hundred and twenty-three and five-tenths feet north of the original location of the government stake; and that the respondents' fence is thirty feet north of a line extended due east therefrom.

Upon this evidence the trial court erred in granting the nonsuit. Being undisputed it was sufficient to locate the center of First street, and to show that the respondents had placed their fence north thereof. If the parties had caused a line to be surveyed and extended running due east from the center of First street in East Spokane, they would have definitely located the true boundary line between them in exact accordance with the respective descriptions by which the original

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tract had been partitioned. The exact point to be determined was the center of First street on their west boundary line. The appellants introduced evidence locating this point sufficient to call for evidence in rebuttal.

The respondents, by reason of the fact that the right of way of the Washington and Idaho Railroad Company is mentioned in the latter portion of their description as their south line, claim that they are entitled to a strip of land five hundred and thirty-one and five-tenths feet wide, north of such right of way, and that such strip would extend to the point where they have located their north boundary fence. The right of way of the railroad company is the last call mentioned in their description, which previously mentions the center of First street, and fixes the line running east therefrom as their north boundary. If there is any discrepancy in these two calls, the one first made must prevail, the survey being made from the starting point as indicated by the description. The respondents base their contention upon an incorrect theory, as their north line first fixed runs directly east from the center of First street, and must prevail.

The judgment is reversed, and the cause remanded with instructions to grant a new trial.

HADLEY, C. J., MOUNT, FULLERTON, and Root, JJ., concur.

[No. 7057. Decided April 8, 1908.]

THOMAS F. CONLAN, *Respondent*, v. CHARLES P. OUDIN *et al.*,
*Appellants.*¹

CORPORATIONS—DISSOLUTION—AUTHORITY OF TRUSTEES. Bal. Code, § 4274, making the trustees of a corporation upon its dissolution the trustees of the stockholders and creditors with power to settle up affairs, was intended to apply to voluntary and not to involuntary dissolutions.

SAME—RECEIVERS—JURISDICTION TO APPOINT—PARTIES PLAINTIFF. The last sentence of Bal. Code, § 5790, providing that upon the involuntary dissolution of a corporation, the prosecuting attorney shall at once institute proceedings for a receivership, is only directory, and does not preclude the institution of proceedings by any interested party.

SAME—SHOWING OF NECESSITY. Under Bal. Code, § 5790, a receiver may be appointed upon the involuntary dissolution of a corporation without a showing as to any necessity therefor.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 2, 1907, upon the pleadings, appointing a receiver upon the involuntary dissolution of a corporation. Affirmed.

Gallagher & Thayer, for appellants.
R. L. Edmiston, for respondent.

HADLEY, C. J.—This action involves a contest over a receivership for the assets of a dissolved corporation. In another action brought by the state of Washington on the relation of Thomas F. Conlan, who is also the plaintiff in this case, the Oudin & Bergman Fire Clay Mining & Manufacturing Company, a corporation, was, by a judgment of the court, dissolved. The fact of such dissolution was alleged in the complaint in this action, and furthermore, that the defendant Charles P. Oudin was, at the time of the dissolution and now is, in possession and control of all of the assets and property

¹Reported in 94 Pac. 1074.

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of the estate of the corporation ; that at no time did the board of trustees of the corporation consist of more than two persons, and that at the time of the dissolution, and for more than three years prior thereto, the defendant Charles P. Oudin was the only trustee thereof ; that during said time Oudin was engaged in organizing and managing a rival pottery corporation ; that at the time of the dissolution, the capital stock consisted of \$150,000, divided into fifteen hundred shares of the par value of \$100 per share ; that the plaintiff was the owner of seven hundred and fifty shares of the stock, being one-half of the whole amount, and that he is now entitled to one-half of the proceeds from the estate of the corporation ; that the defendant Charles P. Oudin was the owner of one share, and the defendant Eva M. Oudin was the owner of seven hundred and forty-nine shares of the capital stock. The above facts were admitted by the answer of the defendants. Certain other allegations of the complaint not above enumerated were denied, but in view of the admitted facts the court rendered judgment upon the pleadings and appointed a receiver. The defendants have appealed.

It will be observed from the above statement of admitted facts that the respondent is the owner of one-half the property of the defunct corporation, and the two appellants own the other half, in the ratio of their respective stockholdings. Appellants contend that under the terms of Bal. Code, § 4274 (P. C. § 7075), the persons who are trustees of a corporation at the time of its dissolution become the trustees of the stockholders and creditors, with full power and authority to settle up the affairs of the corporation and distribute the proceeds of the estate among the stockholders. We think it was the evident intention of the legislature to apply the provisions of § 4274 to cases of voluntary dissolution, the procedure for which is outlined in § 4275 (P. C. § 7076). Such a dissolution is effected by a vote of two-thirds of all the stockholders at a meeting called for that purpose, followed by certain prescribed procedure in court. In considering the matter from

the legislative standpoint, it was doubtless believed that, in cases of voluntary dissolution, there is ordinarily sufficient unity of purpose to make the former trustees proper and desirable administrators of the corporate estate. The dissolution in the case at bar was not a voluntary one effected under the above statute. It was brought about by the suit of the state on the relation of a single stockholder owning but one-half of the stock. Bal. Code, § 5789 (P. C. § 1443), provides that involuntary dissolution of corporations may be accomplished by the judgment of the court. Section 5790 (P. C. § 1444) provides that, when the judgment is rendered against the corporation, the court "shall restrain the corporation, appoint a receiver of its property and effects, take an account and make a distribution thereof among the creditors." The last sentence of the section is as follows: "The prosecuting attorney shall immediately institute proceedings for that purpose."

Appellants argue from the last sentence above quoted that the appointment of the receiver is limited to actions instituted by the prosecuting attorney. We think the legislature did not so intend. The sentence with reference to the duties of the prosecuting attorney in the premises was evidently intended in a directory sense and not as a jurisdictional requirement. The principal thing to be accomplished is the appointment of a receiver to act somewhat in the capacity of an administrator for the corporate estate when the property has been left without an authorized custodian and manager. It was, therefore, made the duty of the prosecuting attorney to see that proceedings are forthwith instituted for that purpose. It does not follow, however, that it is only through him as the medium that proceedings may be brought. With as much propriety they may be commenced by any interested person such as a stockholder or creditor, as was done in this case.

It is further argued that a receiver should in no event be

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appointed unless a necessity therefor is shown to exist. We think the legislature has determined that the necessity does exist whenever an involuntary dissolution has been adjudged by the court, and when the corporation so dissolved has left an estate for settlement and distribution. The legislative reason for not applying the same rule to involuntary dissolutions as that provided for voluntary cases is apparent. In the latter class of cases harmony and agreeable understanding are supposed to exist so that the estate may be peaceably settled by the former trustees without the intervention of the court. In the former class, however, the very existence of the involuntary element suggests the lack of harmony and of a responsible and agreeable head for the management of the estate, and the legislature, recognizing the propriety of receivers in such cases, made positive provision for their appointment. The admitted facts in this case show the existence of statutory conditions calling for a receiver, and the court properly gave judgment on the pleadings.

The judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

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[No. 6945. Decided April 10, 1908.]

COEUR d'ALENE & SPOKANE RAILWAY COMPANY, *Respondent*,
v. UNION PACIFIC RAILROAD COMPANY *et al.*,
*Appellants.*¹

COMMERCE—INTERSTATE REGULATIONS—VIOLATIONS—AGREEMENT VIOLATING SCHEDULE—CARRIERS. Where connecting railroads had published, pursuant to the interstate commerce act, a schedule of joint rates on shipments of freight cars on their own wheels, which specified \$150 for empty cars from St. Louis to Spokane, and if loaded with freight to the account of the carrier, \$90 per car in addition to the freight earned, in case of shipments from Missouri river terminals and Port Arthur, Ont., a contract by part of such railroads having lines from Kansas City to Spokane whereby they agreed to ship loaded cars from St. Louis or Kansas City to Spokane free of charge in consideration of the use of the same for carriage of freight, is void, under the interstate commerce law prohibiting agreements at variance with the rates prescribed in the schedule, and the scheduled rate may be collected; and it would be immaterial that the connecting line shipped the cars from St. Louis to Kansas City, loaded, and received the benefit of the freights earned between those points, the contracting carriers having no line from St. Louis to Kansas City.

SAME—CONTRACTS—CONSTRUCTION. A schedule specifying a rate of \$90 per car for the shipment of cars from Missouri river points to Spokane on their own wheels, if loaded, in addition to the freight earned, is violated by a carriage under an agreement to ship free of charge in consideration of the use of the cars for the carriage of freight, although the cars were not loaded with through freight to the point of destination, but were used in loading and reloading along the way and to Seattle and other points beyond and not on the route, and were not returned to the point of destination for from three to six months; since there was nothing to show the intention of the parties to the contract that a use should be made of the cars not contemplated by the schedule; and since in civil proceedings the scheduled rates must control where it is not clear that the conditions are dissimilar.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 3, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

¹Reported in 95 Pac. 71.

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W. W. Cotton, Samuel R. Stern, and James G. Wilson, for appellants.

Graves, Kizer & Graves and *E. H. Belden*, for respondent.

Root, J.—In the early spring of 1904, the American Car & Foundry Company, at its plant in St. Louis, was building twenty box cars for the respondent. The respondent desired to have these cars when completed shipped to Spokane. They were, after negotiations between the respondent and the appellants, finally carried from Kansas City to the city of Spokane, over the lines of the appellants. The respondent claims that the appellants agreed to carry these cars free of charge to the respondent, in consideration of the use of the same for the carriage of freight for account of the appellants, and the appellants claim that they were prevented, under the interstate commerce law and a schedule of joint rates of charges established and filed with the interstate commerce commission in accordance with said act, from carrying said cars at any rate less than ninety dollars per car. Upon the arrival of these cars at Spokane, the appellant The Oregon Railroad & Navigation Company refused to deliver the same to the respondent except upon the payment of the rate of \$90 per car, or \$1,800 in the aggregate. This sum of \$1,800 was finally paid under protest by the respondent, who, in November, 1904, commenced action against the appellants to recover the sum so paid.

The appellants in their answer, after a denial of a portion of the respondent's complaint, set up that the Union Pacific Railroad Company owned a line of railroad from Kansas City to Granger, the Oregon Short Line Railroad, a line of railroad from Granger to Huntington; and the Oregon Railroad & Navigation Company, a line from Huntington to Spokane; that these lines formed a continuous line from Kansas City to Spokane, but that each of said roads was separate and distinct, and that neither of appellants had any interest in the earnings or operation of either of the other roads; that ap-

pellants had established a joint tariff of rates of charges governing the transportation of railroad cars over said continuous line from Kansas City to Spokane, and had filed the same, in accordance with the act of Congress, known as the interstate commerce act; that the schedule of joint rates established a rate of \$150.80 per car from Kansas City to Spokane, when carried empty, and a rate of \$90 per car between said points when used by appellants for the carriage of freight for their own account; that this schedule of tariffs was in force and governed the carriage of the cars in question; that by the interstate commerce law the defendants were prevented from charging or participating in any rate between these points less than that provided in said schedule; that on the 4th of March, 1904, the twenty cars were delivered to the Missouri Pacific Railway at St. Louis for carriage over its line to Kansas City, and to be there delivered to the Union Pacific Railroad Company for further carriage over the line of the Union Pacific and that of the other appellants to Spokane; that, prior to the delivery of the cars to the Missouri Pacific at St. Louis, the American Car & Foundry Company, the agent of the respondent, applied to the agent of the appellants at St. Louis for the quotation of a rate for the transportation of the cars over appellants' lines, and that, contrary to the tariff in force, the agent of appellants quoted to the American Car & Foundry Company a free rate from Kansas City to Spokane; that prior to the time the cars had left St. Louis, the appellants discovered the erroneous quotation of a free rate and notified the said American Car & Foundry Company, the respondent's agent, that appellants could not transport said cars for less than \$90 per car and the use of the cars en route; that neither the American Car & Foundry Company nor the respondent withdrew the shipment; that upon the arrival of the cars at Spokane The Oregon Railroad & Navigation Company refused to deliver the same except upon the payment of \$90 per car, or \$1,800 in the aggregate, and that the same was so paid by the respondent.

The reply put in issue the material allegations in the an-

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sver. The parties hereto, prior to the trial in the lower court, entered into a stipulation of facts. This stipulation, which is attached to the statement of facts as an exhibit, was the only evidence offered by the plaintiff on the trial. The defendants offered some additional evidence, from which the following facts are established:

That the appellants are the owners of, and operating, lines of railroad between the points, as alleged in their answer, which form a continuous line from Kansas City to Spokane, but neither of said roads owns, or is interested in the line of the Missouri Pacific, or any road east of Kansas City; that the Missouri Pacific owns a line from St. Louis to Kansas City, which, at said last-named place, has a physical connection with the line of the Union Pacific; that the said route from Kansas City to Spokane is on the most direct and regular route of any lines of railroad owned by defendants, or any of them, for shipments originating at Missouri river points and St. Louis and destined to Spokane; that the plaintiff at all times knew that neither of the appellants had any line, nor was interested in any line, running to St. Louis, or to any point east of Kansas City; that the appellants, together with other roads operating to the Pacific coast, and the Missouri Pacific and other roads operating between the Mississippi river and Missouri river, and with other roads further east forming a continuous line or route from the Mississippi river points and other points further east to the Pacific coast points, had established joint rates or charges passing over continuous lines or routes from all Mississippi river points to Pacific coast points, on practically every line of commodity or freight. These schedules of rates had been duly filed with the interstate commerce commission, as provided by the said interstate commerce act, and the rates, as shown in said schedules, were in force during all of the times covered by the transactions in controversy in this case. Page 21 of this schedule, it is stipulated, is the only part thereof which provides a rate for the transportation of cars. It should be noted that the rate of \$90 on loaded cars on their own wheels applies only to

shipments from Missouri river terminals and Port Arthur, Ont. Said page 21 is as follows:

"INTERMEDIATE" COMMODITY RATES.

| TO "NORTH PACIFIC COAST TERMINALS" AND "INTERMEDIATE POINTS," As designated on Pages 1, 2, 3 and 4. ARTICLES. Minimum Weight, Carloads, 80,000 Pounds, except as Otherwise Provided. | IN CENTS PER 100 POUNDS | | |
|---|-----------------------------------|--|--------------------------------------|
| | FROM | | |
| | Chicago and Com. Points. | Missis- sippi River Com. Points. | Missouri River Com. Points. |
| C. L. | C. L. | C. L. | C. L. |
| RAILWAY EQUIPMENT: | | | |
| Cars, Narrow Gauge or parts thereof K. D., loaded on Standard Gauge cars; also Ballast Cars for Street and Interurban Railways; in cents per 100 lbs..... | 150 | 145 | 135 |
| Equipment, Machinery and Supplies for Standard Gauge Steam or Electric Railways, not owned and operated by Lines members of the Trans-continental Freight Bureau, will be subject to full tariff rates, except as provided below. | | | |
| Empty Freight Cars on their own wheels will be charged from Missouri River Terminals and Port Arthur, Ont., full tariff rates, based on short line mileage by an authorized route to point of actual destination. | | | |
| When loaded with freight (which includes freight consigned to owners of equipment), and destined to points west of Helena, Mont., and Ogden, Utah, \$90.00 per car from Missouri River Terminals and Port Arthur, Ont. | | | |
| Full Tariff rates will be charged on freight loaded in the cars. | | | |
| No mileage or per diem allowance will be made on freight or passenger equipment, loaded or empty. | | | |
| Freight and Passenger Cars must be equipped with automatic air brakes, and be subject to inspection in accordance with Master Car Builders' Rules. | | | |
| Staves and Heading, rough or finished; Hoops and Bolts (will not apply on Tank or Vat Stuff), min. C. L. wt. 40,000 lbs | 82-1/4 | 80 | 80 |

For "Terminal" Commodity Rates see pages 23 to 88, inclusive.

The entire controversy in this case arises over the question as to whether the provision of the schedule, as set out, has any application to a shipment of the nature of the one involved in this action. The contention of the appellants is that it does apply, and the respondent's contention is that it does not. It further appears, from the facts established by the stipulation, that St. Louis is a Mississippi river point, within the meaning of the schedule, and Kansas City a Missouri river point, and Spokane a North Pacific coast point west of

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Helena, Montana, and Ogden, Utah; that the Missouri Pacific is a line from St. Louis to Kansas City; that Kansas City is on the continuous line from St. Louis to Spokane via the lines of the Missouri Pacific, Union Pacific and the other appellants; that the respondent is not a member of the Trans-continental Freight Bureau; that full tariff rates, referred to in said schedule with reference to cars moving on their own wheels, is ten cents per car per mile. It further appears from the stipulation that, while the cars in question were being built, some negotiations were had between the respondent and appellants concerning the shipment of the cars from St. Louis to Spokane, which correspondence is set out at length in the stipulation of facts. It appears from the correspondence that the rate contracted for was quoted as a result of a misinterpretation of certain telegrams passing between the assistant general freight agent of the Union Pacific Company at Omaha and a general agent of appellants at St. Louis. The former official, upon hearing of the rate agreed upon, peremptorily ordered it cancelled, but the cars, at this time, had been delivered to the Missouri Pacific Railway for shipment to Kansas City. The cars were loaded at St. Louis with freight for Kansas City, and transported to the latter city over the Missouri Pacific line. They went in lots of ten cars each, the shipping receipt in each instance being as follows:

"FORM 131.

"St. Louis, Dorcas St., 3-3, 1904.

"Wagon No. —— St. L. I. M. Ry.

"Received in good order from American Car and Foundry
Company:

"The following Articles marked as below:

| Directions | Description | Weight |
|--------------------------------------|-------------------------|--------|
| C. D'A. & S. Ry. | 10 new box cars. | |
| Spokane, | C. D'A. & S. | |
| Wash. | 400, 401, 402, 403, 404 | |
| Care W. C. Watrous | 405, 406, 407, 408, 409 | |
| Supt. Transportation | A. C. & F. Co. pays | |
| Mo. Pac. Ry., City. | I. M. switching only. | |
| To be loaded to Kansas City, | Corrected ticket. | |
| for delivery to U. Pac. when empty." | | |

Stamped across the face in red ink is the following:

"Car loaded by shippers. The St. L. I. M. & S. Ry. Co., getting no revenue except for switching only handles it on condition that under no circumstances will it be held responsible for quality, quantity or condition of contents. Switching \$— per car of 40,000 lbs., excess at proportionate rate."

"T. P. Adams, Agent, Per D. H."

After delivery of their freight at Kansas City, the cars were loaded by these defendants and started for Spokane. Only one car was sent directly to the last-named city. Two of them carried loads to Seattle and were returned to Spokane from that city. One carried a load to Wardner, Idaho. One had a load to Garfield, Washington. Others delivered freight at different points between Kansas City and Spokane, and were reloaded, some of them several times, and forwarded. None of the cars reached Spokane until June, and some of them did not reach there until September. There is nothing to indicate that respondent had any dealings with the Missouri Pacific relative to hauling the cars from St. Louis to Kansas City, the arrangements with that company appearing to have been made by appellants' agents. The cars were in St. Louis. Respondent desired them moved to Spokane. With that purpose in mind, it opened negotiations with appellants, and to bring about that result the latter negotiated with the Missouri Pacific in order to have the cars go over the latter's line to where they could be transferred to, and carried over, appellants' lines. The trial of the case in the superior court resulted in a judgment in favor of the plaintiff for the recovery of the excess freight paid under protest as hereinbefore mentioned. From this judgment, the defendants appeal.

The appellants claim that this was a contract between them and the respondent for transportation of the cars from Kansas City to Spokane. The respondent claims that the contract called for the carriage of the cars from St. Louis to Spokane. In view of our conclusion upon another branch of the case, we will assume, without deciding, that the contention of the

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respondent is correct. The appellants also maintain that the rates on page 21 of the schedule apply to this shipment, while the respondent maintains that said rates have no application to the shipment in question. We are then brought to the question of whether this contract was a valid one in the light of the interstate commerce law. It has been settled by the decisions of the supreme court of the United States that the rates provided and published by railroad companies under and pursuant to said statute must control over the rates agreed upon between the carrier and shipper whenever there is a conflict between the two, and that the carrier is not estopped to collect the full amount prescribed by the rates published under the statute where such amount is in excess of that which the carrier, by contract with the shipper, has agreed to accept for a given shipment. *Texas & Pac. R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628; *Gulf etc. R. Co. v. Hasley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910. And it is conceded in this case that respondent is not entitled to recover if the rates in the published schedule apply to this shipment. The appellants maintain that, if this contract be deemed to be one of shipment from St. Louis to Spokane, the contract entered into by respondent and appellants was invalid as being in conflict with § 4 of the interstate commerce law. That section reads as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter dis-

tances for the transportation of passengers or property ; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act." 3 U. S. Com. Stat., page 3155, § 4.

They also maintain that the rate prescribed on page 21, hereinbefore mentioned, applies to a shipment made either from St. Louis or Kansas City, and further claim that, if said rate applies only from Kansas City, the contract between these parties was nevertheless illegal, because it called for a rate less than that published as applying to such shipments from Kansas City to Spokane, and was not a "joint" rate established as by law required.

The respondent urges that the route from St. Louis to Spokane constitutes a "line" separate and distinct from the "line" composed of the appellants' roads extending from Kansas City to Spokane, even though the latter constitute a portion of the former ; that by reason of this being a separate "line," as that term is understood and used in § 4 of the interstate commerce law, it was legal to make a rate thereover from St. Louis to Spokane which should be less than the rate from Kansas City to Spokane, arguing that such lesser rate was justified by the different conditions that obtained. It appeared in the evidence that companies having railroads between St. Louis and Kansas City could afford to carry freight cars loaded free of charge, except what they would obtain as freight upon the goods carried ; but that on the lines west of Kansas City this condition did not obtain ; that over the latter-mentioned lines the greater part of the shipping was towards the east, and that if these railroad companies hauled cars belonging to other people and filled with freight, it would necessitate hauling an equal number of their own cars empty, and that consequently they would reap no advantage from such an arrangement. It was in evidence that there was sharp competition in both St. Louis and Kansas City as to freight destined to points west of Helena and Ogden. Respondent re-

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lies much upon the case of *Chicago etc. R. Co. v. Osborne*, 52 Fed. 912, from which it quotes the following:

" . . . where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined."

Respondent also places reliance upon *Parsons v. Chicago etc. R. Co.*, 63 Fed. 903, from which it quotes as follows:

"This court held in the case of *Railway Co. v. Osborne*, 10 U. S. App. 480, 3 C. C. A. 347, and 52 Fed. 912, which suit grew out of the establishment by the defendant company of the same freight rate that gave rise to the present action, that, where two connecting carriers unite in putting in force a joint through tariff between given points, such joint tariff is not the standard by which the reasonableness of the local tariff on either line is to be determined. It was decided that, where two connecting carriers unite in a joint tariff, they form practically a new and independent line, and that the joint rate established over such line may be made less than the sum of the local rates, or even less than the local rate of either company over that part of its road constituting a part of the joint line, without violating the long and short haul clause found in the fourth section of the interstate commerce law. The court was careful to limit the foregoing proposition by the proviso that, under the first section of the interstate commerce act, all rates, whether local or not, must be 'reasonable and just.' But it distinctly overruled the contention that a local rate between two points on the same road is necessarily unlawful because it is higher than the rate charged under a joint tariff for a much longer haul over a line which is composed in part of that portion of the road to which the local rate applies."

The case of *Chicago etc. R. Co. v. Osborne*, *supra*, is authority for the contention that, where two or more companies owning connecting lines unite in a through tariff, they form

practically a new and independent line. But, as we read the opinion in that case, we do not find it an authority for the rate involved in this case. After making use of the language just quoted, Mr. Justice Brewer, who wrote the opinion in that case, said:

"That we may not be misunderstood, we do not mean to intimate that the two companies, with a joint line, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when two companies, by their joint tariff, make a new and independent line, that new and independent line may become subject to the long and short haul clause. But what we mean to decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned."

Respondent urges that the roads of appellants constitute a line from Kansas City to Spokane, bearing the same relationship to the line composed of appellants' roads and the Missouri Pacific as though appellants' roads constituted but one road, and that consequently the rates over this line composed of appellants' roads may be deemed as "local" rates when considered with reference to a rate covering a line from St. Louis to Spokane, and made up of the roads of the Missouri Pacific together with these three of appellants.

It seems to us that the fatal defect in this contract of shipment, even assuming that the differences in conditions might justify this rate from St. Louis to Spokane and notwithstanding the provision in regard to long and short haul of § 4 does not apply, lies in the fact that these appellants and the Missouri Pacific never adopted or published a joint rate such as this contract calls for. It is evident that appellants could not haul these cars over their lines for less than the rate prescribed on page 21 of the schedule, to wit, \$90 per car loaded. Appellants had no line between St. Louis and Kansas City. If they agreed to take the cars at St. Louis, as respondent maintains, they could do so and handle them for shipment only by entering into an arrangement with the Mis-

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souri Pacific or some other company having a line from St. Louis to Kansas City, whereby a joint rate would be made under the shipment from St. Louis to Spokane, or enter into an arrangement with some such company by which the cars would be shipped under an independent contract from St. Louis to Kansas City, and then, under another contract, taken over their lines to Spokane. If the shipment to Kansas City over the Missouri Pacific was by virtue of a contract covering merely that line, and the appellants then took up the shipment as an independent proposition to be handled over their lines from Kansas City to Spokane, it is difficult to understand why the published schedule rate would not apply, and we do not understand respondent as claiming that it would not apply, its contention being that the contract was one of shipment from St. Louis to Spokane. It is admitted, however, that there was no joint rate upon cars of this character from St. Louis to Spokane, unless the rate provided on page 21 of the schedule applied. There is no contention that the Missouri Pacific was a party to the contract of shipment involved herein. The law forbade these appellants to make a contract to haul these cars from Kansas City to Spokane at a rate less than \$90 per car and the freight money earned by the cars. This being true, it certainly does not comport with the spirit of the law if they are permitted to haul the cars not only over these three roads, but also over them and another road, and without any compensation other than the amount received from the freight hauled in the cars.

Appellants could not make a "joint" rate from St. Louis to Spokane, via Kansas City, without joining with some company that had a road from the latter city to St. Louis. Hence there was no such joint rate unless page 21 of the schedule provides such, which respondent disputes. Appellants could not make a so-called "local" rate from St. Louis, as they had no road reaching that city. It is stipulated that appellants had no interest in the Missouri Pacific, and no interest in the freight money which these cars earned in going over that

road from St. Louis to Kansas City, and received no portion thereof. Consequently appellants received no profit on the shipment of the cars prior to their arrival in the latter city. This being true, why should they be permitted to send them on over their lines at less than the schedule rate? Where a rate is made over two or more roads connecting and making a continuous "line," over a portion of which line there is a published joint rate, we understand that the through rate must be that joint rate plus the local rate beyond the further, or to the nearer, terminus of the joint rate "line;" and that this can be obviated only by all of the connecting roads uniting in a joint rate, after notice to the interstate commerce commission, for the entire line made up of all these connecting roads.

In the case of *United States v. Wood*, 145 Fed. 405, the court said:

"And in a case like the one at bar, if a joint tariff had been established by arrangement and filed with the Commission, covering the lines of the Baltimore & Ohio and the Mutual Transit Company to Duluth, neither the Baltimore & Ohio nor the Mutual Transit Company can deviate from that joint tariff, except upon the usual notice to be filed with the Commission; and where, as in this case, there was no joint tariff filed from Philadelphia to Winnipeg, neither company over which this shipment of iron pipe passed could lawfully charge or demand or collect a greater or less compensation for the transportation of property than was specified in its schedule of its joint rates filed with the Commission. In other words, if these carriers desired to form a continuous line from Philadelphia to Winnipeg, and to make a lower rate for the transportation of property than they were collecting on the two joint tariffs then in force covering the same route, then they should have given notice, according to the act, and filed their schedule with the Commission; and so long as they did not do this, they could not lawfully deviate from the rate established, which is the sum of the two joint rates mentioned."

Under this interpretation of the law it would seem that to make the contract herein involved valid there must have been a joint rate, in the amount specified in the contract, and a

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schedule of said rate filed with the commission. There being no such "joint" rate on these cars from St. Louis to Spokane, we cannot see what difference it made with the rate over appellants' line from Kansas City to Spokane whether the cars came to them from St. Louis or from any other city or town in this country, or whether the shipment originated in Kansas City. Appellants could not make a contract, as carrier, to ship the cars from St. Louis, as they had no road from that city. Hence, they could be parties, as carriers, to a shipment from St. Louis to Spokane only by a joint tariff arrangement with some road connecting their lines with St. Louis. The Missouri Pacific Company not being a party to this contract and no joint rate arrangement being in existence between it and appellants, we are unable to find authority for any rate upon this shipment less than the joint rate from Kansas City to Spokane plus the rate from St. Louis to Kansas City, the latter being in this case merely the freight earned by the cars.

It is further urged by respondent that the use of the cars contemplated by this contract was not the same as that contemplated by the rates provided on page 21 of the schedule; that those rates were meant to apply to cars loaded with through shipments, and were not intended to have reference to such use as was made of these cars by the appellants under this contract. There is nothing to show what the intention of the parties to this contract was, as to the manner in which the cars should be used in carrying and distributing and being reloaded with freight along the way. It does not appear that the intention of the parties was that the cars should be loaded with freight to their final destination or otherwise. Certainly there is nothing to manifest any intention to make the contract different from that contemplated by the schedule rates found on page 21. Where the facts are such that it is not clear that the conditions are so dissimilar as to render the statute, or the rate published thereunder, inapplicable, such rate will be held, in a civil proceeding, to control. *Missouri*

Pac. R. Co. v. Texas & Pac. R. Co., 31 Fed. 862. It appears to us that this contract, whether it be deemed one of carriage from Kansas City to Spokane or from St. Louis to Spokane, was squarely in conflict with the rates in the published schedule of tariffs, and as such was, under the holdings of the Federal courts, illegal and void. This being true, the appellants were authorized, and it was their duty under the interstate commerce statute, to collect the full rates provided by the published schedule.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

[No. 7086. Decided April 10, 1908.]

T. R. FISHER, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.¹

CARRIERS—CARRIAGE OF GOODS—STORAGE—LOSS PENDING DELIVERY—LIABILITY—WAREHOUSEMEN. A railroad company is liable, as a carrier, for goods unloaded into its warehouse and destroyed by fire, where it appears that the consignee appeared for the goods at noon on the day of their arrival, but was informed that they could probably not be delivered until the way bills were made out the next day, and they were destroyed by fire that night; since the carrier's liability does not become that of a warehouseman until the consignee has had a reasonable opportunity to remove the goods.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered June 5, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover from a carrier for the loss of goods. Affirmed.

¹Reported in 94 Pac. 1073.

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Opinion Per Mount, J.

B. S. Grosscup and Ira P. Englehart, for appellant.
Snyder & Luse, for respondent.

MOUNT, J.—This case was tried to the court without a jury. Findings were made in favor of the plaintiff, and a judgment was entered against the defendant for \$368.19. The defendant appeals.

The facts are as follows: The respondent was doing business in North Yakima, in this state. In May, 1906, three boxes of merchandise, of the value of \$368.19, were shipped from Portland, Oregon, over the line of the appellant, to the respondent at North Yakima. The goods arrived at North Yakima about noon on May 5, 1906. About the time the goods arrived, the plaintiff called at the depot for them. He was informed that the goods were probably in the shipment of that day, but that the way bills were not made out and would not be made out on that day. Plaintiff did not return for the goods on that day. During the afternoon the goods were unloaded from the car and placed in the warehouse of the railway company. At about eleven o'clock of that night a fire started in the warehouse known as Coffin Bros.' warehouse, about one hundred feet from the freight house of the railway company where the goods in question were stored. The North Yakima city fire department was unable to control the fire, and it spread to, and consumed, the warehouse of the railway company, and the goods stored therein were lost. It is conceded that there was no negligence on the part of the railway company. Upon these facts the appellant argues that it is liable only as a warehouseman and not as a carrier. This presents the only question in the case.

Many authorities hold that, where goods are shipped by rail and arrive at their destination and are there unloaded into a warehouse and held ready for delivery, the company's liability ceases as a common carrier, and it is thereafter liable as a warehouseman only. See note to *Denver etc. R. Co. v. Peterson*, 97 Am. St. 76, 90 (30 Colo. 77, 69 Pac. 578), where

many of the cases cited by the appellant are mentioned. But the rule is stated in note e., page 91 of the same volume, as follows:

" . . . merely placing the goods in storage at their destination does not, in our opinion, reduce the carrier's liability to that of a warehouseman. Its liability as carrier continues, according to the sounder reason and the weight of authority, until at least such time as the consignee has had a reasonable opportunity to inspect the goods and take them away in the usual course of business."

Several cases are then cited which support this rule. The author continues:

"This doctrine applies both to carriers by rail and to carriers by water. But the consignee must act with reasonable expedition. If he fails within a reasonable time and after a fair opportunity to take charge of the goods, the carrier's liability becomes that of a warehouseman only."

And many cases are cited to support this rule. We think the rule as quoted above under note e. is the rule which should apply in this case. It was substantially followed by us in *Normile v. Northern Pac. R. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271. When the respondent called for his goods he was informed in substance that they could not be delivered to him until the next day. They were destroyed that night. He therefore had no opportunity to obtain the goods or to take them away before they were destroyed. Under these facts and the rule above stated, the liability of the appellant was that of a carrier and not of a warehouseman.

The judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

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Opinion Per Curiam.

[No. 6756. Decided April 10, 1908.]

WASHINGTON WATER POWER COMPANY, *Respondent*, v.
ABACUS ASSOCIATION, *Appellant*.¹

APPEAL—BONDS—AMOUNT. An appeal from a judgment quieting title, in which the court, at appellant's request, fixed the amount of a supersedeas bond at \$200, will be dismissed when the bond on appeal, conditioned also as a supersedeas bond, was in the sum of only \$200; since it should have been \$400 (Crow, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 10, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Appeal dismissed.

William E. Richardson and P. C. Shine, for appellant.

H. M. Stephens, for respondent.

PER CURIAM.—The respondent brought this action against the appellant to quiet title in itself to certain real property situated in the city of Spokane. A decree quieting the title as prayed for was entered in its favor, together with a judgment for the costs of the action. The appellant, claiming to be in possession and desiring to avoid being ejected therefrom, applied to the court to fix the amount of a supersedeas bond to stay proceedings pending an appeal to this court. The court fixed the amount at \$200, whereupon the appellant gave its notice of appeal and filed a bond in that sum conditioned both as a supersedeas and appeal bond, giving no other or different bond. The respondent moves to dismiss the appeal on the ground that the bond is insufficient. The motion must be granted. The bond to have been sufficient as an appeal and supersedeas bond should have been in the penalty of at least \$400. *Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999; *Sumner*

¹Reported in 94 Pac. 1072.

v. Rogers, 21 Wash. 361, 58 Pac. 214; *Galloway v. Tjossem*, 22 Wash. 103, 60 Pac. 129; *Beezley v. Sessions*, 22 Wash. 125, 60 Pac. 130; *Ritchey v. Cedar Mill Co.*, 22 Wash. 511, 61 Pac. 160; *Graham v. American Surety Co.*, 28 Wash. 735, 69 Pac. 365; *Loy v. Coey*, 31 Wash. 684, 71 Pac. 552; *Hawthorn v. Washington & Great Western R. Co.*, 33 Wash. 707, 74 Pac. 1135; *In re Drasdo's Estate*, 35 Wash. 412, 77 Pac. 735; *Macy v. Sullivan*, 41 Wash. 564, 84 Pac. 601; *Tibbitts v. Henry*, 46 Wash. 306, 89 Pac. 880.

The appeal is dismissed.

CROW, J. (dissenting)—I cannot concur in the foregoing opinion, being unable to conclude that the order mentioned in the majority opinion fixes the amount of any supersedeas bond. On the contrary, its recitals indicate an intention to fix only the amount of the appeal bond at \$200 which, being an unnecessary order, Bal. Code, § 6505 (P. C. § 1053), was surplusage and of no force or effect for any purpose. While it is true that the bond is conditioned as both an appeal and supersedeas bond, it was evidently intended to perform the functions of an appeal bond only, and was sufficient for that purpose. The rule announced by the cases cited in the majority opinion, although often repeated by this court, is one of such severity that the scope of its operation should not be unnecessarily extended. On the authority of *Douglas v. Badger State Mine*, 41 Wash. 266, 83 Pac. 178, 4 L. R. A., N. S., 196, I think the motion to dismiss the appeal should be denied, and I therefore dissent.

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Statement of Case.

[No. 6989. Decided April 11, 1908.]

**F. W. RAMM, Respondent, v. HEWITT-LEA LUMBER COMPANY,
Appellant.¹**

MASTER AND SERVANT—GUARDING MACHINERY—UNGUARDED SET SCREW—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. Whether a set screw might have been advantageously guarded under the factory act, negligence in failing to do so, assumed risks and contributory negligence, are questions for the jury, where it appears that an employee first attempted to apply oil from in front, reaching around a timber, when the pulley threw dust into his eyes, whereupon he passed to a position back of the timber and was caught on an unprotected set screw on the pulley, there being evidence that his usual work was on the floor below, that he had never been there before, and that the set screw might have been advantageously guarded, and the evidence as to his contributory negligence was conflicting.

SAME—CONTRIBUTORY NEGLIGENCE—UNSAFE METHODS—INSTRUCTIONS. It is proper to refuse a requested instruction that a servant is guilty of contributory negligence if he assumes an unsafe method of performing an act, when there were one or more safe methods that he might have adopted, where the evidence shows that he had no knowledge or means of knowledge of the unsafety of the course pursued; since the instruction is too broad.

SAME—OILING MACHINERY IN MOTION—CUSTOM. An employee is not guilty of contributory negligence in attempting to oil a shaft without stopping the machinery in a shingle mill where it was not customary and he had been instructed not to do so.

TRIAL—INSTRUCTIONS—REQUESTS. Upon refusal to give an instruction because not requested in proper form, it is not prejudicial error to fail to prepare and give another instruction on the same subject.

SAME. It is not error to refuse an instruction where the point was covered in the general charge.

Appeal from a judgment of the superior court for King county, Steiner, J., entered March 16, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a shingle mill through contact with a set screw in a revolving pulley. Affirmed.

¹Reported in 94 Pac. 1081.

Opinion Per CROW, J.

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Peters & Powell, for appellant.*Walter S. Fulton*, for respondent.

CROW, J.—Action by F. W. Ramm against the Hewitt-Lea Lumber Company, a corporation, to recover damages for personal injuries. From a judgment in favor of the plaintiff, the defendant has appealed.

The appellant owns a saw and shingle mill, in which the respondent, employed as a millwright, was injured. There is evidence that the appellant had installed a friction clutch pulley in its shingle mill, attached to a shaft, which in turn was attached to and supported by large upright timbers; that the respondent was summoned to the shingle mill on the second floor, where the boxing on the shaft at the clutch pulley had become heated from want of oiling; that he first attempted to apply oil and tallow by reaching around the upright timbers; that the pulley by its rapid revolutions created a current of air, threw dust into his eyes, and interfered with his work; that he then passed to a position back of the upright timbers, where he approached the shaft and pulley from the opposite side, thus avoiding the current; that the pulley was then revolving upon his right, and that some unguarded set screws upon its surface caught his clothing and drew him against it and the shaft, causing his injuries. The respondent testified that he had not theretofore done any work in the shingle mill located on the upper floor; that his usual employment was in the sawmill on the lower floor; that he was not aware of the existence of the projecting and unguarded set screws; and contends that the appellant was guilty of negligence in failing to guard them. There was other evidence tending to show that they were afterwards guarded. The appellant contends that the pulley and set screws, by their location in a remote and unfrequented portion of the mill, did not require guarding, and that they could not be more advantageously guarded than by being in such a position.

By its first assignment the appellant insists that the trial court erred in refusing its motion for a nonsuit. There is

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evidence, although disputed, sufficient to show that the set screws were exposed, dangerous, and unguarded; that the respondent was ignorant of their existence; that they and the pulley could have been advantageously guarded without impairing their use, and that they were the cause of the accident. While there was also evidence sufficient to sustain the jury in finding the respondent guilty of contributory negligence, it was disputed and not of such a character as to justify the trial court in holding him guilty of such negligence as a matter of law. The questions as to whether the pulley and set screws could have been advantageously guarded, whether appellant was negligent in failing to guard them, whether being advantageously guarded by their position the respondent assumed the risk, and whether he was guilty of contributory negligence, were all issues of fact which were properly submitted to the jury.

The appellant contends that, in going back of the shaft and upright timbers, the respondent selected an unsafe position; that the place occupied by him where he first attempted to do the oiling was safe, and that the trial court erred in refusing an instruction which appellant requested, in the following words:

"If you find that there were two or more methods in which the plaintiff could have performed the services in which he was engaged at the time he was injured, one a safe method and the others unsafe, I charge you that it was the duty of the plaintiff to have followed the safe method, and if you should find that he did not do so, and the injury resulted therefrom, then the verdict must be for the defendant."

Not only was this request refused, but no other instruction was given upon the same subject. We are in considerable doubt as to whether there was evidence to warrant any instruction on the point involved, but assuming the evidence was sufficient, the requested instruction being defective was properly refused.

In *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385, it appeared that there were two methods by which

the plaintiff could have done his work, one safe and the other dangerous, and that he voluntarily chose the latter. This court said:

"The rule is well settled that where there are two methods by which a service may be performed, one perilous and the other safe, an employee, who voluntarily chooses the perilous rather than the safe one, cannot recover for an injury thereby sustained. *Bailey, Master's Liability for Injuries to Servant*, p. 161, and authorities cited."

See, also, *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Bundy v. Union Iron Works*, 46 Wash. 231, 89 Pac. 545.

In each and all of the above cases the undisputed physical conditions disclosed two methods in which the plaintiffs could have performed their respective tasks, the one safe and the other dangerous, and that they voluntarily selected the latter. They were held guilty of contributory negligence as a matter of law. Such is not the situation here. The evidence in this case does not without dispute disclose such physical conditions as to necessarily show a safe and also an unsafe method. In fact it strongly tended to show that, by reason of the unguarded set screws, either method was beset with danger, and that with guarded set screws both would have been safe. How could the respondent have voluntarily selected an unsafe in preference to a safe method if he did not know that the one was without hazard while the other was dangerous? The requested instruction was too broad. It should have been so restricted in its scope as to further instruct the jury that, if they should find from the evidence that the respondent actually knew or, in the exercise of due caution, should have known, that one of the two methods was safe and the other unsafe, and that if they should further find he voluntarily selected the latter, they could then find him guilty of contributory negligence. Although an employee having knowledge of his opportunities must select a known safe method in preference

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to one known to be unsafe, yet to hold him guilty of contributory negligence, it must appear that he not only makes a voluntary selection of the unsafe method but that in doing so he knows, or in the exercise of due caution should know, that a safe method is available. The requested instruction was defective in that it failed to so inform the jury, and was properly refused.

The appellant in further support of its request for the instruction also contends that, by using a convenient lever, the respondent could have released the friction from the clutch pulley, thus causing its outer portion which carried the set screws to cease revolving, and that he would then have been free from danger. Such a proceeding would have stopped the machinery in the shingle mill, and there was evidence that it was not the custom to close down the mill when oiling was to be done, but that on the contrary the respondent's instructions were to keep it running. Moreover, in making this contention, the appellant assumes that the respondent had knowledge of the set screws, which he denied.

Having refused to give the instruction in the form requested, the trial judge committed no prejudicial error in failing to prepare and give an instruction upon the same subject. Moreover the appellant's assignment of error is based upon the refusal of the one requested, and not upon the failure to give another in its place.

"To entitle a party to an instruction asked, it must be correct as an entirety. If not correct in all its parts, both as to law and facts, it may properly be refused, although the court may at its option comply with the request so far as it is correct. . . . Nor is the court bound to modify, limit, or qualify an instruction so as to remedy its defects and remove its infirmities. It may refuse the request entirely, and leave the party to assume the hazard of its entire correctness." 11 Ency. Plead. & Prac., pp. 234, 236.

See, also, *Howe v. West Seattle Land & Imp. Co.*, 21 Wash. 594, 69 Pac. 495.

The appellant further contends that the trial judge erred in refusing an instruction requested by it under the factory act of 1905, as to the character of machinery requiring safeguards. The instruction requested was argumentative and therefore objectionable. The trial judge, however, fully instructed the jury upon the same points in a clear, comprehensive, and impartial manner, and no prejudicial error was committed in refusing the one requested.

The judgment is affirmed.

HADLEY, C. J., Root, Mount, and FULLERTON, JJ., concur.

[No. 7221. Decided April 11, 1908.]

THE STATE OF WASHINGTON, *on the Relation of the Town of Pasco, Plaintiff, v. THE SUPERIOR COURT FOR FRANKLIN COUNTY, Respondent.*¹

STATUTES — IMPLIED REPEAL — INTOXICATING LIQUORS — LICENSE. Bal. Code, § 2934, conferring authority to regulate, license, or prohibit the sale of intoxicating liquors, is not impliedly repealed by the later act, Bal. Code, § 1011, subd. 10, conferring authority to license sales for the purposes of regulation and revenue.

INTOXICATING LIQUORS—LICENSE—REPEAL. The authority to grant a liquor license for the purposes of regulation and revenue includes the power to refuse a license or to restrict sales to a certain locality.

SAME—JUDICIAL REVIEW. The refusal of a liquor license by a town counsel is a legislative act not subject to judicial review or control.

Certiorari to review a judgment of the superior court for Franklin county, Zent, J., entered February 21, 1908, granting a writ of mandamus upon overruling a demurrer to the application for the writ. Reversed.

Routhe & Hinman, for relator.

Lovell & Davis, for respondent.

¹Reported in 94 Pac. 1086.

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Opinion Per Curiam.

PER CURIAM.—This is an original proceeding by writ of certiorari to review a final judgment of the superior court of Franklin county, directing the issuance of a peremptory writ of mandamus to compel the municipal officers of the town of Pasco to issue a retail liquor dealer's license to the relators and plaintiffs in the court below.

On December 20, 1907, H. J. Craven and A. F. Sylvester as relators and plaintiffs applied to the superior court of Franklin county for the writ to be directed to the defendants James McIntyre and others, as mayor, councilmen, and clerk of the town of Pasco, a municipality of the fourth class. In substance they alleged that they were proprietors of the Mint saloon, located on lot 8, block 4, of the town of Pasco; that a license had been granted to them on December 21, 1906, for one year; that they had conducted their saloon in an orderly and law-abiding manner, and without complaint from any source; that they had made legal application for a renewal of their license, authorizing them to continue their saloon business in the same locality; that the defendants had refused the same; that their refusal was not based upon any alleged misconduct of the plaintiffs; that the defendants contended it was intended for the promotion of better police regulation; that they were endeavoring to create a restricted district for saloons in a different locality; that the action of the defendants was fraudulent, oppressive, arbitrary, and taken for the purpose of injuring the property of the plaintiffs and advancing the values of other property, and that the refusal of a license would damage plaintiffs and compel them to close their saloon in their present place of business.

The defendants demurred to this application for the reasons that the court had no jurisdiction of the subject-matter of the action, and that the application did not state sufficient facts to constitute a cause of action. Their demurrer being overruled, they refused to plead further, whereupon the trial judge entered final judgment awarding the writ of mandamus to compel the defendants to grant a renewal of the saloon license to the plaintiffs in their present location, as prayed.

Bal. Code, § 2934 (P. C. § 5714), confers upon the mayor and council power to regulate, restrain, license, or prohibit the sale or disposal of intoxicating liquors within the corporate limits of the town of Pasco. The respondents, citing *Seattle v. Clark*, 28 Wash. 717, 69 Pac. 407, contend that this section, which was enacted in 1888, has been repealed by implication by subdivision 10 of Bal. Code, § 1011 (P. C. § 3528), subsequently enacted. Repeals by implication are not favored. In our opinion the case of *State v. Seattle*, 31 Wash. 149, 71 Pac. 712, disposes of this contention. Moreover, § 2934 has since been recognized by this court as an existing statute, in *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 526, 87 Pac. 818. Were we to conclude, however, that § 2934 has been repealed by § 1011, yet subdivision 10 of the latter confers upon municipalities of the fourth class power to license the sale of intoxicating liquors for the purposes of regulation and revenue. Power to grant such a license includes power to refuse the same. The allegations of the application for the writ do not show that the municipal officers have exceeded their powers under either section above mentioned. They might at their election grant the license or refuse to do so. If they granted it, they had authority for purposes of regulation to direct that the business should be confined to a certain locality, and they have done nothing more. In adopting such restrictions and in granting or refusing a license, they were exercising legislative functions. It is a well-established principle of law that the courts will not inquire into the motives that may actuate municipal officers in the performance of such function~~s~~.

The case of *State ex rel. Aberdeen v. Superior Court*, *supra*, is controlling in this action. It was there held that an order of the city council revoking a liquor license previously granted was not the exercise of a judicial function, but was a legislative act which could not be reviewed by the courts. Following that decision, we hold that the original granting of a liquor license or its refusal is a legislative act not subject to

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Statement of Case.

judicial review or control. The courts cannot be called upon to determine when a liquor license shall or shall not be issued; nor can they, by writs of certiorari, mandamus, or other proceedings, review and control the action of the municipality or compel its officers to grant such licenses. Any attempt to do so would be an unwarranted exercise of legislative functions under the guise of judicial action.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

FULLERTON, J., took no part.

[No. 7009. Decided April 11, 1908.]

G. P. FISHBURNE, Respondent, v. R. ROBINSON, Appellant.¹

JUDGMENTS—NOTWITHSTANDING VERDICT—TRIAL. A judgment for plaintiff notwithstanding a verdict for the defendant is properly entered where the plaintiff's case was established and defendant's evidence was too vague to constitute a defense.

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. The defendant cannot claim prejudicial error in striking out parts of his answer where he was not denied the right to introduce any matter constituting a defense whether included in the answer or not.

BILLS AND NOTES—DEFENSES—EVIDENCE—SUFFICIENCY. In an action upon promissory notes, bearing admittedly genuine signatures, vague statements of the defendant that he could remember signing but two notes, one with conditions not appearing on the face of the notes in suit, are not sufficient to warrant a verdict for the defendant or to constitute any defense.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 10, 1907, in favor of the plaintiff, notwithstanding the verdict of a jury rendered in favor of the defendant, after a trial on the merits, in an action upon promissory notes. Affirmed.

¹Reported in 95 Pac. 80.

Opinion Per Curiam.

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Harry H. Johnston and Ralph R. Duniway, for appellant.

Ellis & Fletcher and G. P. Fishburne, for respondent.

PER CURIAM.—The respondent sued the appellant to recover upon two promissory notes. The complaint averred the execution of the notes by the appellant, their delivery to the payees named therein, their indorsement by the payees and delivery to the respondent, their nonpayment by the appellant, and demanded judgment for the amount due thereon. The answer of the appellant was a general denial, and affirmative defenses to the effect that the notes had been materially changed and altered since their execution and delivery, that they were executed without consideration, and that they had been paid. The court, on respondent's motion, struck out certain parts of the answers on the ground that the matter alleged was immaterial and inconsistent with the general denials, and a trial was had before a jury on the remaining issues, resulting in a verdict for the appellant. The respondent thereupon moved for judgment notwithstanding the verdict, which motion the court granted, entering judgment for the full amount demanded in the complaint. From this judgment, this appeal is taken.

A large part of the briefs of counsel are devoted to questions of practice, and to rulings of the court with reference to the pleadings, but these questions we have not found necessary to discuss at length. That it is proper practice for the trial judge to enter a judgment *non obstante veredicto*, when the proceedings warrant it, is settled by the case of *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109, where the authorities are collated and discussed. The questions relating to the pleadings are moot questions in this court, as the trial court did not deny the appellant the right to introduce evidence on any matter constituting a defense, whether included in the pleadings as finally settled or not.

The only material inquiry is, did the facts testified to by the appellant constitute a defense? The trial court held that they

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Syllabus.

did not, and we are clear that the holding is correct. The evidence consisted of vague statements on the part of the appellant to the effect that he did not remember of signing but two notes payable to the payees named in the notes sued upon, and that on these notes one of the payees signed with him as maker. But this is too indefinite to overcome the presumptions arising from the face of the notes themselves, which show no such conditions and bear the admittedly genuine signature of the appellant. Without discussing the case further, therefore, we conclude that the judgment should be affirmed.

It will be so ordered.

[No. 6974. Decided April 13, 1908.]

**THE STATE OF WASHINGTON, *Respondent*, v. FRED CLEM,
*Appellant.*¹**

INDICTMENT AND INFORMATION—LESSER DEGREES OF OFFENSE—LARCENY. Upon a charge of larceny from the person, defendant may be convicted of petit larceny, as the same is but a lesser degree of the same offense.

TRIAL—MISCONDUCT OF COURT—COMMENT ON EVIDENCE. The repetition by the court of a statement by a witness, for the purpose of further explanation from counsel, is not unlawful comment on the evidence.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS AND EXCEPTIONS. Unlawful comment on the evidence by the court, to which no objection was made or exception taken below, cannot be objected to for the first time in the appellate court.

CRIMINAL LAW—EVIDENCE—GOOD CHARACTER—RELEVANCY. It is not error to restrict the examination of the accused as to particular matters concerning his previous occupations for the purpose of establishing good character, where accused had been allowed to state the same generally and go as far as circumstances required.

SAME. Evidence offered by the accused concerning his family and of whom it consisted is properly excluded when it would only distract the attention of the jury from the issue.

¹Reported in 94 Pac. 1079.

SAME—APPEAL—REVIEW. The appellate court is not warranted in setting aside a conviction for insufficiency of the evidence where there was substantial evidence of appellant's guilt.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 21, 1906, upon conviction of the crime of petit larceny, after a trial upon an information charging the crime of larceny from the person. Affirmed.

James L. Crotty, William C. Keith, and Longfellow & Fitzpatrick, for appellant.

Kenneth Mackintosh, for respondent.

FULLERTON, J.—The appellant was informed against for the crime of larceny from the person, the charging part of the information being as follows:

“He, the said Fred Clem, in the county of King, state of Washington, on the 16th day of October, A. D. 1906, did then and there wilfully, unlawfully and feloniously, and without violence or putting in fear one Andrew Hughes, from the person of said Andrew Hughes, twenty-five dollars (\$25) in lawful money of the United States, one pocket book of the value of fifty cents (50c), and one watch and chain of the value of five dollars (\$5), all of the total value of thirty dollars and fifty cents (\$30.50) in lawful money of the United States, the property of said Andrew Hughes, take, steal and carry away.”

At the trial the jury returned a verdict against him for petit larceny, on which he was adjudged guilty by the court and sentenced to a term of six months in the county jail. From the judgment and sentence he appeals.

It is objected that the court erred in denying the appellant's motion in arrest of judgment, based on the ground that the crime of petit larceny is not included in the charge contained in the information, but we think this objection untenable. To feloniously take from the person of another the goods of that other and carry the same away, has always been

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a crime, punishable as either grand or petit larceny. Therefore when the legislature defined and made punishable the specific act of feloniously taking property from the person it did not create a new offense; it but recognized that there were degrees in larceny, some of which were deserving of more severe punishment than others, and sought to regulate the punishment in proportion to the offense. Larceny from the person, grand larceny, and petit larceny are for this reason but different degrees of the same crime, and are properly included in an information charging the higher offense, and being so, it is, of course, proper for the jury, on an information charging the higher offense, to find the accused guilty of any one of the lesser offenses that the facts proven will warrant.

It is further assigned that the court commented upon the testimony to the prejudice of the appellant. An examination of the record, aside from disclosing that the court merely repeated a statement made by a witness upon the stand for the purpose, apparently, of having a further explanation from counsel, shows that no objection was made or exception taken to the remark when made, and even if we found the remark error, which we do not, it could not be objected to for the first time in this court.

It is next assigned that the court erred in excluding certain evidence. The evidence rejected related to the prior occupation of the appellant. The court permitted him to state generally what his previous occupations had been, and sustained objections thereto only when inquiries were made as to particular matters concerning such occupations. This evidence was admissible, if admissible at all, only because it tended to establish the appellant's good character, and we think the court went as far in that direction as the circumstance required. Neither was it error to sustain objections to questions concerning his immediate family and of whom it consisted. These questions could but distract the attention of the jury from the real inquiry and in no wise enlighten them as to the guilt or innocence of the appellant.

It is finally contended that the evidence is insufficient to justify the verdict. But on this question there is substantial evidence tending to show the appellant's guilt. True, the evidence is contradicted, and a very plausible explanation is given of the incriminating circumstance that a part of the stolen property was found upon his person, but the question of guilt or innocence was for the jury and trial court, and inasmuch as they agree upon the guilt of the accused, this court has no lawful warrant to interfere.

The judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.

[No. 7097. Decided April 13, 1908.]

MARK MUNSON, *Appellant*, v. GREGOR McGREGOR,
*Respondent.*¹

VENDOR AND PURCHASER—FAILURE TO CONVEY—REMEDIES OF VENDEE—EVIDENCE OF PERFORMANCE—PRINCIPAL AND AGENT—AUTHORITY OF AGENT. In an action for damages for breach of a vendor's agreement to convey property sold to the plaintiff, evidence that the vendor's agent requested further time on behalf of the plaintiff, and stated that plaintiff refused to complete the purchase, is inadmissible and insufficient to support findings in favor of the defendant vendor as to the vendee's nonperformance, where it appears that the agent was not authorized to represent or bind the plaintiff.

SAME—NECESSITY OF TENDER BY PURCHASER. A tender of performance by a vendee is not necessary before bringing action for damages for the vendor's failure to convey, where the vendor had sold the property to another and put it out of his power to perform his contract.

SAME—ABILITY TO PERFORM—EVIDENCE—SUFFICIENCY. A finding that a vendee was not able to perform his part of a contract calling for certain payments is not warranted by evidence that he had arranged to secure the money from a third party, as the same would be *prima facie* evidence of ability to perform.

SAME—BREACH BY VENDOR—DAMAGES. Upon a vendor's refusal to convey property and a wrongful sale thereof to a third person

¹Reported in 94 Pac. 1085.

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at the advanced price, the best evidence of the vendee's damages may be the excess of the advanced price, plus earnest money paid, where there was evidence that the value exceeded the contract price and the property was of a fluctuating value.

Appeal from a judgment of the superior court for King county, Rigg, J., entered May 28, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Granger & Magill, for appellant.

George Fowler, for respondent.

FULLERTON, J.—In the summer of 1906 the respondent held a contract in writing for the purchase of certain real property situated in the city of Seattle, which property he listed with one Fraser, a real estate agent, for the purposes of sale. On July 3 of that year the agent found a purchaser in the person of the appellant, and thereupon entered into the following contract with him:

“Seattle, Washington, July 3, 1906.

“Received from Mark Munson One Hundred Twenty-five and 00-100 Dollars, as earnest money for the purchase of the following described property in the county of King, state of Washington, viz.: Lots 5 and 6, block 6, Ladd's 1st Addition to Seattle. The purchase price is Forty-five Hundred (\$4,500) Dollars, to be paid as follows: All assessments and taxes paid in full, \$2,635 more cash upon delivery of a contract for warranty deed from the owner within twenty days from date of delivery of abstract. The balance to be secured by a mortgage on the premises with interest at 7 per cent per annum, payable \$580 November 23d, 1906, \$580 November 23, 1907, \$580 November 23, 1908. Abstract of title brought down to date, certified to by a competent abstractor, to be furnished by owner, and purchaser to have twenty days in which to examine the same. If this title is not perfect and cannot be perfected within sixty days, said payment of \$125 shall be refunded. If the purchaser fails to perform his part of this agreement, the payment of \$125 already made shall be forfeited. Time is the essence of this contract.

“By Fred Fraser, Agent.”

The respondent accepted the contract, in writing, and was paid the earnest money mentioned therein. The abstract required to be furnished by the terms of the contract was handed the appellant on July 11, 1906. The respondent had never recorded his contract of purchase, and the abstract failed to show his interest in the property, but showed, on the contrary, title in a third person, a stranger to the contract. The appellant, within the twenty days allowed him for an examination of the abstract, returned it to the agent with the request that it be completed so as to show the respondent's interest in the property, and his right to convey the same. A few days after, the respondent sold the property to another person at an advanced price, thereby putting it beyond his power to comply with his contract with the appellant. The appellant thereupon brought this action to recover as for a breach of the contract, averring damages in the sum of \$2,000. The action was tried by the court without the aid of a jury, and resulted in a judgment in favor of the respondent.

The trial court based his judgment on a finding to the effect that the appellant had, through the real estate agent, asked for further time in which to make the payments, and, when further time was refused him, had, through the same source, returned the abstract to the respondent; and, further, that the appellant had not tendered performance, and was at no time during the life of the contract able to perform on his part.

The first of these findings is made on the testimony of the respondent himself. He testified that the agent did request further time on behalf of the appellant, and later did bring the abstract to him with the statement that the appellant would not or could not perform. But this evidence went in over the objection of the appellant, and was clearly inadmissible under the record as it appears before us. There is nothing in the record to show that the agent was ever authorized to represent the appellant, while it abundantly appears that he did,

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in all of the dealings between the parties, represent the respondent; in fact the appellant testified without being disputed that he had never seen the respondent until the morning of the trial. The agent's declaration therefore could not bind the appellant, and the court was in error in basing any finding of fact thereon.

Neither was it a defense to show that the appellant did not tender performance of the contract. In order for the appellant to recover it was necessary for him to show that the respondent was guilty of a breach of the contract, and this he could have done effectively, of course, by tendering performance on his part and compelling the other side to refuse. But this was not the only way such breach could be established. It was a sufficient evidence of a breach to show that the respondent had, during the life of his contract with the appellant, put it out of his power to perform. This the appellant did by showing by undisputed evidence the sale and conveyance of the property to an innocent third person. A tender under such circumstances would have been but a useless ceremony, and no litigant is required to do a useless thing in order to maintain his action.

The finding that the appellant was not able to perform the contract on his part is also without support in the record. The only competent evidence on the question is the testimony of the appellant that he had arranged with a third person to furnish the money for the purchase price, and the testimony of such third person that he had made such an arrangement with the appellant. This it would seem is sufficient to establish the fact in the absence of evidence to the contrary, even if we assume that the burden was upon the appellant to establish the fact, a question we do not here undertake to decide.

We conclude therefore that the appellant established his right to a recovery, and the amount thereof must be considered. There was evidence tending to show that the property was worth at different times a sum considerable in excess of the contract price, but its value was shown to be fluctuating,

and we have concluded that the best evidence is the price the respondent received for it when he sold pending his contract with the appellant. The price so received was \$5,000, being \$500 more than the price for which he agreed to sell it to the appellant. The appellant will therefore be allowed to recover that sum, together with the amount paid as earnest money at the time of the execution of the contract, making \$625 in all. Interest on the whole sum will be allowed from the date of the trial in the court below, with costs in both courts.

The cause is remanded with instruction to the court below to enter judgment accordingly.

HADLEY, C. J., Crow, and Mount, JJ., concur.

[No. 6859. Decided April 13, 1908.]

SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY,
Respondent, v. WASHINGTON & GREAT NORTHERN
RAILWAY COMPANY *et al.*, *Appellants.*¹

COURTS—DECISIONS—FEDERAL QUESTIONS. Whether provisions of an act of Congress constituted conditions subsequent is a Federal question, upon which the decisions of the United States courts are controlling.

PUBLIC LANDS—GRANTS—RAILROAD RIGHT OF WAY—CONDITIONS SUBSEQUENT—FORFEITURE—WHO MAY CLAIM. Act of Cong. of June 4, 1898, granting a railroad right of way through the Colville Indian Reservation becomes a grant *in praesenti* upon the filing and approval of the map of definite location; and the provision in section 5 of the act that the grant shall be forfeited unless grading shall be commenced within six months, and twenty-five miles of railroad be completed within two years, is a condition subsequent which can only be taken advantage of by the government by a judicial proceeding or appropriate legislative action in the nature of “office found.”

¹Reported in 95 Pac. 64.

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Opinion Per Root, J.

Appeal from a judgment of the superior court for Ferry county, Carey, J., entered February 5, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an injunction. Reversed.

M. J. Gordon, Charles A. Murray, George V. Alexander, and Thomas R. Benton, for appellants.

W. T. Beck, and Alfred M. Craven, for respondent.

Root, J.—This was an action by plaintiff to enjoin defendants from interfering with the use of a right of way for railway purposes through the Colville Indian reservation in this state. From a judgment and decree in favor of plaintiff, the defendants appeal.

By an act of Congress approved June 4, 1898, there was granted to the appellant Washington Improvement and Development Company, and to its assigns, a right of way for its railway, telegraph, and telephone lines through the Colville Indian reservation, beginning on the Columbia river near the mouth of the Sans Poil river, running thence northerly through said reservation toward the international line. There was also granted grounds adjacent for the purposes of stations, other buildings, side tracks, and switch tracks. The act provided for the filing of maps showing the route when determined upon, said maps of definite location to be approved by the secretary of the interior. These maps were subsequently filed, and were approved by the honorable secretary prior to November 27, 1899. Before the commencement of this action, the Washington Improvement & Development Company transferred all of its rights, privileges, and immunities acquired under this act of Congress to the appellant Washington & Great Northern Railway Company.

Since the filing and approval of the maps of definite location as aforesaid, this respondent, acting under authority of the act of Congress of March 3, 1875, and the act of Con-

gress of March 2, 1899, located a route for its railway over practically the same line indicated by the maps filed by the Washington Improvement & Development Company, as aforesaid, and filed its maps with the secretary of the interior, who approved the same on October 17, 1905.

The act of June 4, 1898, under which appellants claim, contained the following provision:

“Provided, That when a map showing any portion of said railway company's located line is filed herein as provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void, and said location shall be approved by the secretary of the interior in sections of twenty-five miles before the construction of any such section shall be begun.”

Section 5 of the statute reads as follows:

“That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this act.”

Neither the Washington Improvement & Development Company nor its successor, the Washington & Great Northern Railway Company, commenced grading within six months after the approval of its maps of definite location, nor did it construct twenty-five miles of railroad, nor any, within two years after the passage of the act. For these reasons the respondent claims that appellants' location of the strip indicated by its maps became void and forfeited, and that respondent had a right to go upon the same strip of land and survey and locate its line of railway; that having surveyed and marked out its proposed line of railway upon substantially this same strip of ground after the expiration of the two years, and its said maps of location having been approved by the secretary of the interior, respondent claims that its location thereupon is legal, and that appellants have no rights whatever in the premises, and should be enjoined from in any manner inter-

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fering (which appellants were doing) with the respondent's use and occupancy thereof.

Appellants maintain that the provisions of the statute, requiring the commencement of work within six months from the approval of the maps of definite location and the construction of twenty-five miles of railroad within two years after the passage of the act, were conditions subsequent, and that any breach or alleged breach of said conditions can be brought in question only by the government; that the respondent is not in a position to urge these matters, and cannot avail itself of any forfeiture on account of any such breach. It will be seen that the matters in issue are Federal questions, and the determination thereof by this court must be made in the light of the decisions of the supreme court of the United States in so far as the latter apply thereto, and an examination convinces us that every question here raised is controlled by decisions heretofore made by that high court. In the light of those decisions, we are led to the following conclusions:

The statute under which the Washington Improvement & Development Company located its line through this Indian reservation constituted a grant *in praesenti*. It was a "floating" grant until the company filed its map of definite location, and the same was approved by the secretary of the interior. The grant then became definite and fixed. It attached to the particular strip of land indicated by the map thus filed and approved, and the title to said premises became thereupon vested in the railway company. The provisions requiring the commencement of grading within six months and the construction of at least twenty-five miles of railroad within two years were conditions subsequent. Upon the failure of the railway company to comply with either of these conditions, the United States government by a judicial proceeding or an act of Congress, or possibly by other appropriate proceeding equivalent to "office found," as known in the common law, could have declared a forfeiture and made a reentry. Until

this should be done, the title remained in the railway company, and could not be disturbed by respondent or any other third party. It was a matter between the appellants and the government. Had Congress theretofore authorized the secretary of the interior or land department to declare forfeiture in cases of this kind, it is possible that the action of the secretary of the interior, in approving the map of location filed by the respondent after the expiration of the two years during which appellant should have commenced grading and should have constructed twenty-five miles of railroad but did not, might be deemed to be a declaration of forfeiture and a re-entry on the part of the government. But no statute or authority of this character is called to our attention, and we are aware of none. It has been many times held by the United States supreme court, that the claiming of a forfeiture provided for in a land grant can only be made under authority of the legislative department, such as an act of Congress declaring or directing a forfeiture, or authorizing such to be made, or by a judicial proceeding by the government, and that persons claiming under other provisions of the statute, such as the homestead or exemption laws, cannot urge a breach of conditions subsequent by the grantees. Among the many decisions of the United States supreme court bearing upon the matters herein discussed, we may call attention to the following:

In the case of *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551, that court, speaking by Mr. Justice Field, among other things, said:

"The provision in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. . . . And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see

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fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed. . . . In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In the case of *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 176, 18 Sup. Ct. 271, 37 L. Ed. 123, the court, speaking by Mr. Justice Brown, said:

"The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the secretary of the interior to decide, and when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in praesenti* of lands to be thereafter identified. *Railway Company v. Alling*, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. *Moffat v. United States*, 112 U. S. 24; *United States v. Minor*, 114 U. S. 233. A revocation of the approval of the secretary of the interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice

Grier, in *United States v. Stone*, 2 Wall. 525, 535: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.' *Moore v. Robbins*, 96 U. S. 530."

In *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201, this language was employed:

"The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the secretary of the interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route."

In *Bybee v. Oregon & California R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305, the court spoke as follows:

"An effort is made to distinguish this case from *Schulenberg v. Harriman*, in the fact that the act not only declares that the lands 'shall revert to the United States,' but that the act itself 'shall be null and void,' from which it is argued that it was the intention of Congress that the failure to complete the road should operate *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. It is true that the language of this statute differs somewhat from that ordinarily employed by Congress in connection with similar grants; but the declaration that the lands 'shall revert to the United States' is practically equivalent to a declaration that the act granting such lands shall cease to be operative if the company fail to complete its road within a specified time."

In *Grinnell v. Railroad Company*, 103 U. S. 739, 26 L. Ed. 456, the court, speaking through Mr. Justice Miller, used this language:

"Another point equally fatal to the plaintiffs in error is, that the assertion of a right by the United States to the lands

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in controversy was wholly a matter between the government and the railroad company, or its grantors. The legal title remains where it was placed before the act of 1864. If the government desires to be reinvested with it, it must be done by some judicial proceeding, or by some act of the government asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding. These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started. It might be otherwise if the legal title was in the government."

In *St. Louis etc. R. Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. 123, 29 L. Ed. 446, the court, speaking through Mr. Chief Justice Waite, spoke as follows:

"It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. *United States v. Repentigny*, 5 Wall. 211, 267, 268; *Schulenberg v. Harriman*, 21 Wall. 44, 63; *Farnsworth v. Minnesota & Pacific Railroad Co.*, 92 U. S. 49, 66; *M'Micken v. United States*, 97 U. S. 217, 218; *Van Wyck v. Knevals*, 106 U. S. 360. Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity."

In the case of *United States v. Repentigny*, 5 Wall. 211, 18 L. Ed. 627, Mr. Justice Nelson, speaking for the court, said this:

"We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of as-

suming the forfeited grant, is subject to the legislative authority of the government."

We think it will be readily seen that the foregoing decisions leave us no discretion in the matter, but conclusively determine the issues in this case adversely to respondent's contention and to the conclusions reached by the honorable trial court.

The judgment and decree appealed from will therefore be reversed, and the cause remanded with instructions to enter a judgment and decree in favor of appellants.

HADLEY, C. J., FULLERTON, CROW, RUDKIN, and MOUNT, JJ., concur.

[No. 7212. Decided April 13, 1908.]

H. W. MARTIN, *Respondent*, v. AMOS ABBOTT MOORE,
Appellant, MARY PRESTON *et al.*, *Defendants*.¹

WILLS—CONSTRUCTION—ESTATE DEVISED—TRUSTS—DESCENT AND DISTRIBUTION—RIGHTS OF LEGATEES AND EXECUTOR. The title to lots does not vest in legatees upon the death of the testator, as provided by Bal. Code, § 4640, in the case of a devise, where a nonintervention will provides that one-half of the proceeds of the interest in certain lots remaining unsold at the testator's death shall "when sold" belong to a daughter, and the other half to be invested to make a fund for a son on arriving at majority; since the intention is clear, and is to be implied, that the lots were to be conveyed and the proceeds divided by the executor, who is a trustee for all purposes necessary to execute the will.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered September 4, 1907, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to quiet title. Affirmed.

Lester S. Wilson, for appellant.

John L. Sharpstein and T. P. & C. C. Gose, for respondent.

¹Reported in 94 Pac. 1087.

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Opinion Per HADLEY, C. J.

HADLEY, C. J.—This is an action to quiet title to real estate, described as lot 1, block 40, in the city of Pullman, Whitman county. The plaintiff alleges that he is the owner of the land in fee simple, and that the defendants claim some interest therein based upon the following facts: On September 24, 1901, and prior thereto, one Josephus M. Moore was the owner of an undivided third interest in the lot in question. On said date he died and left a will, by the terms of which he devised to his daughter, Mary Louisa Preston, along with other property, the following: "The one-half of the proceeds of lots when sold of the undivided one-third interest of lots in Pullman unsold at my death." He also devised to his minor son, Amos Abbott Moore, along with other property, the following: "The one-half of the proceeds of lots when sold, of the undivided one-third of Pullman lots unsold at my death, his share of said proceeds to be invested to make a fund for him when he becomes of age." The will also contained the following clause: "I do hereby designate and appoint my brother, Miles C. Moore, the executor of this my last will and testament. I do hereby request and expressly provide and direct that no bond or other security be required of him, and so far as by law in any case can be done he be relieved from the supervision and control of all courts."

On the petition of the widow of the deceased, the will was duly admitted to probate by the superior court of Walla Walla county, and Miles C. Moore was appointed executor without bond. An order was afterwards entered by the court that the estate was solvent and should be settled without the intervention of the superior court of Walla Walla county or any other court. On the 14th day of September, 1905, Miles C. Moore was duly appointed guardian of the estate of Amos Abbott Moore, the minor above named, and he is still such guardian. Thereafter Miles C. Moore as executor undertook to sell and convey to the plaintiff the interest of the deceased in the lot, and he executed and delivered a deed purporting

to convey the same, and received from plaintiff the purchase price therefor.

The widow of the deceased, Eva H. Moore, and the two children aforesaid were made defendants in this suit, together with Miles C. Moore as guardian of the minor son. It is alleged that the widow and children assert that Miles C. Moore as executor was not authorized or empowered to sell or convey the interest of the deceased, but that he asserts that he was so authorized. Such being the view of the executor, who was also the general guardian of the minor, Lester S. Wilson was appointed guardian *ad litem* in this suit. In behalf of the minor, he demurred to the complaint, which set up the foregoing facts, and the other defendants made default. The demurrer was overruled, and the guardian *ad litem* having refused to plead further, judgment was entered for the plaintiff quieting his title to the land as against all of the defendants. The minor, through the guardian *ad litem*, has appealed.

The question presented by the appeal is, do the foregoing facts, which the demurrer admits, entitle the respondent to a decree quieting his title. It is appellant's contention that, under the terms of § 1, page 197, Laws of 1895, Bal Code § 4640 (P. C. § 2718), the title to the land vested immediately in appellant upon the death of the testator, subject only to the debts of the deceased, family allowance, expenses of administration, and any other charges for which the land is liable under existing laws. It is therefore urged that, with the title thus resting in the appellant, it was not within the power of the executor to transfer it. It is clear from the provision of the will above quoted that the testator intended it to be a nonintervention will, and that whatever powers were necessary to carry its terms into effect should be exercised by the executor without the direction of any court. If the testator intended that the executor convey the land, then the latter had the power to convey it as it was done. We must search the will for the intention of the testator. If it is

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clear that the intention was that the title vest in appellant under the statute, then his contention must prevail. We think from the words used by the testator it is manifest that such was not the intention. It will be remembered from the statement of facts in the beginning of this opinion that the will provides that one-half of the proceeds of the interest in the Pullman lots remaining unsold at the testator's death shall "when sold" belong to the daughter. The same provision is made for the other half to go to the son, the appellant, with the added provision in his case that his share of the proceeds shall be invested to make a fund for him when he becomes of age. That it was the intention that the executor should convey the interest of the deceased in the Pullman lots and divide the proceeds between the two children, is entirely clear. Such being true, the title to the land did not vest in the son and daughter upon the death of the father. The brother of the deceased, who was named as executor without the intervention of any court, became a trustee for all purposes necessary to execute the terms of the will. *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428; *Seattle v. McDonald*, 26 Wash. 98, 66 Pac. 145; *In re Macdonald's Estate*, 29 Wash. 422, 69 Pac. 1111. The terms of the trust could not be carried out without the power to sell the land and to transfer the title thereto. The title therefore vested in the trustee for that purpose. It is the established doctrine that "trustees take exactly that quantity of interest which the purposes of the trust require." 2 *Jarman, Wills* (6th ed.), p. 306. No particular form of words is necessary in order to create a trust of this character, but the purpose to create it may be gathered from the language of the instrument by giving to the words employed the customary significance accorded to them when used in similar connections. If by the application of such test it is found that a trust has been created, then the immediate disposition of the title is well stated as follows:

"If the purposes of the trust require that the trustee shall take the fee simple of the legal interest in order that those

purposes may be carried out, he will take an estate of inheritance, though no words of inheritance have been used by the testator in devising the legal interest. Hence, if the interest given to the beneficiary, though it was devised to him in indeterminate language, is greater than the legal interest devised to the trustee, the trust estate will be enlarged in the trustee to answer all the purposes of the trust. If the carrying out of the purposes of the trust require that the trustee shall take a fee, equity will create a fee simple in him by implication without the use of the word 'heirs.' " 2 Underhill, Law of Wills, § 781.

It is a settled rule in the construction of wills or other instruments that, when land is directed to be sold and turned into money, courts in dealing with the subject will consider it as personality and will treat the land as equitably converted in the hands of the executor or trustee.

"As in the construction of wills the intention of the testator is the main guide. In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. There must be an expression in some form of an absolute intention that the land shall be sold and turned into money. This intention may be expressed, as by the use of mandatory words directing the sale, or giving the power of sale in imperative terms. On the other hand the intention to convert may be implied, as where a testator authorizes his executors to sell his real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, although the power of sale is not in terms imperative. The necessity of a conversion of realty into personality to accomplish the purposes expressed in a will is equivalent to an imperative direction to convert and effects an equitable conversion." 9 Cyc. pp. 831-2-3. -

See, also, Page, Wills, § 703; Schouler, Executors (3d ed.), § 217; Pomeroy, Equity Jurisprudence (3d ed.), §§ 1159-60; *Clarke v. Clarke*, 46 S. C. 230, 57 Am. St. 675; *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 76 Am. St. 924, 50 L. R. A. 307; *Fahnestock v. Fahnestock*, 152 Pa. St. 56, 25 Atl. 313, 34 Am. St. 623; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. 117, and note 141-8.

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Statement of Case.

It is therefore manifest in the case at bar that a trust was created by the will of the deceased, Josephus M. Moore, and that the purposes of the trust required an equitable conversion of the real estate in question in the hands of Miles C. Moore, the trustee. The real estate did not descend to appellant as contended, but the title rested in the trustee until the purpose of the trust could be effectuated by the actual exchange of the land for money. That was done when the trustee transferred the title to the respondent and received the purchase price.

The judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

[No. 7058. Decided April 16, 1908.]

THE CITY OF SPOKANE, *Respondent*, v. R. J. GRIFFITH,
*Appellant.*¹

MUNICIPAL CORPORATIONS—ORDINANCE—EVIDENCE—JUDICIAL NOTICE. A conviction in a city police court of the violation of a city ordinance, which was read to the jury by the court from a bound volume of ordinances printed by authority of the city, cannot be objected to on appeal on the ground that the ordinance was not introduced in evidence, where no objection was taken below, since the existence of the ordinance was sufficiently established or would be judicially noticed.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered June 25, 1907, upon a trial and conviction of the violation of a municipal ordinance relating to disorderly conduct. Affirmed.

Alex. M. Winston, for appellant.

L. R. Hamblen, F. D. Allen, and *Harry A. Rhodes*, for respondent.

¹Reported in 95 Pac. 84.

Root, J.—Appellant was charged in the police court of the city of Spokane with disorderly conduct, and convicted. He appealed to the superior court, and upon a *de novo* trial, a verdict of guilty was returned. A motion to vacate the verdict and discharge the prisoner was denied, and judgment and sentence was entered upon the verdict. From this judgment, the present appeal is prosecuted. In his brief appellant says: "There is but one question presented by this appeal. Did the failure of respondent, at the trial of this cause in the superior court, to introduce evidence of the existence of, or the contents of, Ordinance No. A1324, constitute a complete failure of proof."

The ordinance mentioned is that under which appellant was prosecuted. The statement of facts recites that the court gave the jury the substance of the ordinance, and also, "That counsel for the plaintiff called the court's attention and submitted to the court for examination Ordinance No. A1324 of the code and charter of the city of Spokane." Said ordinance was in a bound and printed volume, which bore the certificate of the city clerk, and was printed by the authority of the city of Spokane. The court read the ordinance in full to the jury in giving its instructions to them.

There is some difference of opinion among the authorities as to whether an appellate court may take judicial notice of a city ordinance in a case appealed from a municipal court which was authorized to take such notice of the ordinance. It is unnecessary for us to pass upon this question as we think the existence and contents of this ordinance were sufficiently established by being read to the jury from a legally authorized publication thereof. No exception appears to have been taken to this reading to the jury and no question was raised as to the authenticity of the ordinance so read. As to competency of the evidence, see Bal. Code, §§ 1299, 3947, 6851 (P. C. §§ 406, 7985, 2104).

The judgment of the superior court is affirmed.

HADLEY, C. J. and CROW, J., concur.

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FULLERTON, J. (concurring)—As I understand the rule, the appellate court will take judicial notice of any fact that the court of original jurisdiction must judicially notice. Here the ordinance in question was within the judicial knowledge of the police court, and, being so, it was equally within the knowledge of the superior court to which the cause was appealed. The city of Spokane, therefore, was under no necessity of proving the ordinance, and its omission to do so regularly was not fatal to its case. For this reason I concur in the judgment.

MOUNT, J., concurs with FULLERTON, J.

[No. 7024. Decided April 20, 1908.]

ARNOLD KRUEGER, *Appellant*, v. THE TOWN OF COLVILLE,
Respondent.¹

INTOXICATING LIQUORS—LICENSE—REVOCATION — REFUNDING FEE. Under Bal. Code, § 2935, providing that a liquor license shall be forfeited, in addition to other penalties provided by law, in case the licensee sells liquors to minors, a town council may, without repayment of any portion of the unearned fee, revoke a license upon conviction of the licensee of selling liquor to minors.

SAME—FORFEITURE — CRIMINAL LAW — EXCESSIVE PENALTY. The forfeiture of a \$750 liquor license, in addition to a fine and liability upon a bond, is not unconstitutional as excessive penalty for selling intoxicating liquors to a minor.

SAME—LICENSE—CONSTITUTIONAL LAW—DUE PROCESS. A license to sell intoxicating liquors is merely a temporary permit, and the forfeiture thereof for violation of law is not a deprivation of property without due process of law.

Appeal from an order of the superior court for Stevens county, Kennan, J., entered December 31, 1906, upon sustaining a demurrer to the complaint, dismissing an action to recover the unearned portion of a license fee upon revocation of a retail liquor license. Affirmed.

¹Reported in 95 Pac. 81.

Robertson & Rosenhaupt, for appellant.

Jesseph & Grinstead, for respondent.

MOUNT, J.—The lower court sustained a general demurrer to the plaintiff's complaint and dismissed the action. The appeal is prosecuted from that order.

The complaint shows the following facts: On April 1, 1906, the town of Colville issued a liquor license to the appellant, authorizing him to retail intoxicating liquors in said town for the term of one year. Appellant paid the fee therefor, which was \$750. Subsequently appellant was charged, under the statute, with the crime of selling intoxicating liquors to minors. He pleaded guilty to that charge, and was sentenced to pay a fine. The fine was paid. Thereafter, on June 1, 1906, the town revoked the license because of the conviction above stated, and declared the unearned portion of the license fee forfeited. The prayer is for \$625, being the unearned portion of the license fee.

The question in the case is, may the town revoke the license under the circumstances set out and retain the unearned portion of the license fee. We think there can be no doubt upon this question. The statute provides:

"In granting the license authorized by this chapter the proper authorities shall exact from each applicant a bond in the sum of one thousand dollars, conditioned that the applicant shall keep an orderly house, and will not sell liquors to minors. He shall in case of violating the terms of the license forfeit the same, and be subject to the other penalties provided by law for illegal selling of spirituous, fermented, malt, or other intoxicating liquors; the authorities granting the license shall have full authority and power to declare it forfeited for the violation of any of the terms upon which it is granted." Bal. Code, § 2935 (P. C. § 5715).

It is clear from this statute that the town had power to forfeit the license. There is no statute in this state which authorizes the return of money paid for a liquor license revoked or forfeited, and it has been held that municipalities are not required to repay in such cases, especially where it is revoked

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or forfeited by reason of an act of the licensee. *Parrent v. Little*, 72 N. H. 566, 58 Atl. 510; *Curry v. Township of Tawas*, 81 Mich. 355, 45 N. W. 831; *Melton v. Moultrie*, 114 Ga. 462, 40 S. E. 302; *Toman v. Westfield*, 70 N. J. L. 610, 57 Atl. 125. We think this rule is the correct rule, and that it applies to this case.

Appellant relies upon the case of *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884, but that was a case where the city revoked the license because of a change in an ordinance passed after the license was issued, and the city by its own act rendered the license valueless. It will be readily seen that there is quite a difference between the facts there and the facts here. The rule applied there cannot justly be applied to this case, for the appellant here forfeited his license by his own act by violating not only the letter of his contract but also the law of the state in force when the license was issued.

Appellant contends that the statute above quoted imposes an excessive penalty and is therefore unconstitutional. He also argues that the appellant has paid the fine imposed by the court, and that he ought not to be liable upon his bond and in addition thereto forfeit the unearned license fee. He also argues that the revocation or forfeiture of the license is in conflict with the constitution, because it deprives the appellant of his property without due process of law. There is no merit in any of these contentions, and we shall not discuss them further than to say that we held, in *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 526, 87 Pac. 818, in substance, that a license to sell intoxicating liquors is merely a temporary permit, and not a contract giving vested or property rights.

The lower court properly sustained the demurrer to the complaint, and the judgment appealed from is therefore affirmed.

HADLEY, C. J., Root, FULLERTON, and CROW, JJ., concur.

[No. 7138. Decided April 20, 1908.]

**THE STATE OF WASHINGTON, Respondent, v. CHARLES
PRESTON, Appellant.¹**

INFORMATION—DEGREES—CONVICTION—OF LESSER OFFENSE — GAMING. The misdemeanor of dealing, carrying on, opening, or conducting, either as owner, proprietor, or employee, whether for hire or not, any game of . . . roulette . . . as defined by Bal. Code, § 7260, is necessarily included in the felony of conducting, carrying on, opening or causing to be opened, either as owner, proprietor, employee or assistant, whether for hire or not, any game of . . . roulette . . . in any house where persons resort for the purpose of playing any such game, as defined by Laws 1903, p. 63; and a conviction of the former may be had under an information for the latter offense, charging the conducting of a gambling resort by conducting and carrying on a game of roulette in a place where persons resort for that purpose.

GAMING—SECURITY—INFORMATION—SUFFICIENCY. Bal. Code, § 7260, prohibiting each and every person from dealing, carrying on, opening or conducting "either as owner, proprietor, employee, whether for hire or not," any game of . . . roulette . . . played for gain, is not limited to the conducting of public games, but includes games secretly carried on from which the public is excluded.

SAME—CAPACITY OF PERSON IN GAME. Under such section, "each and every person" is prohibited from gaming and it is not necessary to allege the capacity in which the game was conducted.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered November 7, 1907, upon a trial and conviction of conducting a game of roulette. Affirmed.

Cain & Hurspool, for appellant.

Otto B. Rupp and John H. McDonald, for respondent.

MOUNT, J.—The appellant was charged with conducting a gambling resort. Upon a trial he was found guilty of "conducting and carrying on a game of roulette," and sentenced

¹Reported in 95 Pac. 82.

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to pay a fine. He appeals from the judgment pronouncing sentence.

Two questions are presented for consideration; (1) is the crime for which appellant was convicted necessarily included in the charge of conducting a gambling resort, and (2) if so, does the evidence show that appellant conducted and carried on a game of roulette.

The information, omitting formal parts, is as follows:

"Charles Preston is accused by the prosecuting attorney of Walla Walla county and state of Washington, by this information, of the crime of conducting a gambling resort, committed as follows: The said Charles Preston on the 6th day of October, 1907, in the county of Walla Walla aforesaid, then and there being, did, then and there wilfully, unlawfully, and feloniously conduct and carry on a game of roulette, then and there being a game played and operated with a roulette table and wheel and chips and money, said chips being then and there representatives of value; and that said game was played, carried on, and conducted in a certain building at number 116 Main street in the city of Walla Walla, Washington, the same being a place where persons then and there resorted for the purpose of playing said game, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Washington."

The statute under which this information was filed is as follows:

"Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employee, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, . . . whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house . . . where persons resort for the purpose of playing, dealing or operating any such game, machine, or device, shall be guilty of a felony, . . ." Laws of 1903, page 63.

This statute, as its title states, was clearly intended to "prohibit the maintaining of gambling resorts," and it is conceded that the prosecution in this case was based upon.

and proceeded under, this statute. The misdemeanor statute under which the verdict was returned is as follows:

"Each and every person who shall deal, (play), or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employee, whether for hire or not, any game of faro, monte, roulette, . . . or other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor, . . ." Bal. Code, § 7260 (P. C. § 1877).

This statute was evidently intended to prohibit the games named, and to make each person conducting and carrying on such games guilty of a misdemeanor. It seems to us, under the wording of these two sections, that the lesser crime is necessarily included in the greater, because, in order to convict under the felony statute first above quoted, it is necessary to allege and prove, both that the prohibited games are conducted, carried on, or opened, and also that they are conducted, carried on, or opened in a place where persons resort for that purpose. The rule is settled that a defendant may be convicted of an offense the commission of which is necessarily included within that with which he is charged. Bal. Code, § 6596 (P. C. § 3014). The information in this case clearly charges the misdemeanor in charging the felony. The evidence in the case shows that the appellant owned certain gambling paraphernalia, among which was a roulette wheel, which he had stored in the basement of a certain building in Walla Walla; that three other persons besides himself, on three or four different occasions in a space of three or four months, requested appellant to take them to this place, and thereupon the appellant did take them there, where they played at roulette with chips representing money; that the appellant sold and redeemed these chips and managed the game; that no other persons were permitted there, and the door of the storeroom was kept locked during the time they were there and at other times; that this room was an ordinary storage room and not open to the public.

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It is contended that the statute, by the use of the words "deal or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employee," etc., means that such games shall not be dealt or carried on openly or publicly, and also that, before a conviction can be had, the information should allege that the accused conducted the game either as owner or proprietor or employee. As to the first contention, the evidence clearly shows that the appellant did not conduct a public game, but that the games were strictly private from which the public was excluded. But the statute referred to, in our opinion, means to prohibit the games mentioned even though dealt or opened or carried on in private when they are dealt or carried on for gain. Bal. Code, § 7268 (P. C. § 1885), permits games of chance played for amusement or pastime, and not for gain. The words "each and every person who shall deal or carry on or open," used in the statute, are not limited by any word which indicates that they were used to express games conducted only where the public are invited, and we think it was not the intention of the legislature to so limit them in this act. That was done in the felony act above quoted. We are of the opinion, also, that it was not necessary to allege that the accused conducted the game as owner, proprietor, or employee, because the statute prohibits "each and every person" who shall conduct such games "either as owner, proprietor, employee, whether for hire or not," the evident intention being to make immaterial the capacity in which the game was conducted by the operator. This court said, in *State v. Wilson*, 9 Wash. 16, 36 Pac. 967: "It is the conducting of the game as proprietor and not the gambling with any particular person which the statute prohibits." When that remark was made the court was not then considering the question now presented. The statute does prohibit "the conducting of the game as proprietor," and it does more than that; it prohibits the game by each and every person who shall conduct the same, whether as owner, proprietor, or employee, whether for hire or not.

We find no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., ROOT, FULLERTON, and CROW, JJ., concur.

[No. 7227. Decided April 20, 1908.]

RICHARD CHILCOTT, Respondent, v. GLOBE NAVIGATION COMPANY, Appellant.¹

APPEAL—TIME FOR TAKING—SUBSEQUENT JUDGMENT—MOTION FOR NEW TRIAL—ORAL NOTICE. Where a judgment was immediately entered by the clerk upon rendition of the verdict, and a new trial was denied November 9, an oral notice of appeal must, to be effective, be taken at that time; and the entry of a formal judgment December 9, against the objection of the prevailing party, does not authorize an oral notice of appeal at that time.

JUDGMENT—ENTRY—VALIDITY—PAYMENT OF FEES—APPEAL—FINALITY. A judgment entered by the clerk immediately upon rendition of the verdict, pursuant to Laws 1903, p. 285, is not void because the fees required by Laws 1907, pp. 88-90, were not collected by the clerk; and failure to collect the fees does not affect the finality of the judgment for the purposes of appeal.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 9, 1907, at the instance of the defendant, upon the verdict of a jury rendered in favor of the plaintiff. Dismissed.

H. R. Clise, for appellant.

F. R. Conway, for respondent.

HADLEY, C. J.—This cause was tried before a jury and a verdict was returned for the plaintiff on September 27, 1907. Judgment was entered upon the verdict by the clerk on the same day. The defendant's motion for a new trial was denied November 9, 1907. The judgment from which the appeal is sought was signed by the judge and filed in the office of the

¹Reported in 95 Pac. 264.

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clerk on December 9, 1907. This judgment was signed and filed at the instance of the defendant, over the objection and exception of the plaintiff, and pursuant to a notice given by the defendant. The notice of appeal was orally given by defendant in open court at that time.

The respondent has moved to dismiss the appeal on the ground that there was no sufficient notice of appeal. The notice of appeal to be effective, if given in open court, must be given at the time the judgment is "rendered or made." Bal. Code, § 6503 (P. C. § 1051). It is also provided by § 1, page 285, Laws of 1903, that when a trial by jury has been had, judgment shall be immediately entered by the clerk in conformity to the verdict. The clerk so entered judgment in this case, and it must have been then "rendered or made." The statute of 1903 provides that the granting of a motion for a new trial shall immediately operate as the vacation of the judgment. We held in *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525, and *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839, that, when a motion for new trial has been properly filed, the judgment will not be of final effect until the motion is determined, and that the time for taking an appeal begins to run from the date of the denial of the motion for a new trial. It follows that, if the notice of appeal is given in open court, it must be given at the time the motion for a new trial is denied, since it is then that the judgment becomes final and effective. The notice in the case at bar was not given at that time, but on December 9, one month later, the appellant appeared with a prepared formal entry called a "judgment," obtained the judge's signature, filed the entry over the respondent's objection, and then gave notice of appeal from the judgment so entered. The notice of appeal did not relate to the first judgment entered, and it came too late as a notice of appeal from that judgment. The real judgment in the case had been previously entered, and it became final and effective on November 9, when the motion for new trial was denied. To hold that the appellant's notice

is sufficient would in effect permit a party to voluntarily extend his own time to appeal by bringing into court and filing at his convenience a so-called judgment entry long after the statutory judgment has been entered.

Appellant argues that the statute of 1903, providing for immediate judgment upon the return of the verdict of the jury, must be considered in connection with the statute in regard to costs. It is provided by the statute of 1907, Laws of that year, pages 88, 89, and 90, as follows:

"The several officers herein named shall collect the fees herein prescribed for their official services. . . . Clerks of the Superior Court. . . . If a judgment other than a dismissal or discontinuance is rendered, the party obtaining the same shall pay, at the time of the entry thereof, a further fee as follows; . . . 4. Where the judgment is rendered after an appearance by an adverse party, and a trial by jury, or by the court or a judge, referee, or commissioner, in a cause other than the foreclosure of a lien or mortgage, or partition of real estate, \$6."

It is contended that, under the above statute, the judgment fee of \$6 in a case like the one at bar must be paid at the time the judgment is entered, and that there is in fact no judgment until the fee is paid. Appellant says the judgment fee was not paid until December 9, when the entry which it requested was made. We find nothing in the record which shows that the fee was not paid until that time. But, assuming that it was not, we think that fact is immaterial here. The statute of 1903 makes it the duty of the clerk to enter the judgment immediately upon the return of the verdict. The statute of 1907 makes it his duty to collect certain fees, but it does not provide that a judgment shall be void for mere failure to collect the fee at the time judgment shall be entered. It is no doubt within the province of the clerk to demand the payment of the judgment fee at the time of making the entry, but his neglect to do so, or the mere neglect or refusal to pay on the part of the party in whose favor judgment should go, does not of itself render the judgment a

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nullity. If it might be held to be sufficient ground for the vacation of the judgment, the vacation would have to be accomplished through proper procedure for that purpose, and by an order of court to that effect.

For the foregoing reasons the notice of appeal was insufficient, and the appeal is therefore dismissed.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

[No. 7108. Decided April 22, 1908.]

C. H. STOHLTON *et al.*, *Respondents*, v. KITSAP COUNTY,
Appellant.¹

HIGHWAYS—ESTABLISHMENT BY PRESCRIPTION—EVIDENCE—SUFFICIENCY. Adverse user sufficient to establish a public highway by prescription is not shown, where it appears that the way was first built as a skid road on private property for private logging purposes, and afterwards used as a tram road for logging, and travel over it was similar to that over other logging roads generally regarded as private ways, and on the first claim to a public right, the owners erected gates and notices; since the use was only permissive in its character.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered July 27, 1907, upon findings in favor of the plaintiffs, after a trial on the merits, before the court without a jury, in an action to quiet title. Affirmed.

C. D. Sutton and Brightman & Tenant, for appellant.

G. Ward Kemp, for respondents.

HADLEY, C. J.—This is an action to quiet title to real estate as against the county of Kitsap, and also to enjoin the county, its officers and agents, from trespassing, or inviting others to trespass, upon the land in question. The county answered that it claims no interest in the land except by way

¹Reported in 95 Pac. 268.

of a public easement within that portion thereof over which it alleges that a public highway exists. It is alleged that the way was used by the public adversely, continuously, and uninterrupted for more than ten years prior to the commencement of this suit, and that the plaintiffs have, without right, erected and fastened gates across the highway, and have thereby unlawfully obstructed the same, so that the public cannot use it. The cause was tried by the court without a jury, and resulted in a judgment for the plaintiffs, to the effect that they are the owners in fee and in possession of the whole of the land, that the claim that a public highway exists there is without right, and that the county is forever barred from asserting any claim against any part of the land. The county has appealed.

The errors assigned all involve the single contention that the judgment is not sustained by the evidence. The evidence discloses that what the county now asserts is a public highway was built as a skid road upon private property for private logging purposes many years ago. Afterwards strips of wood in the nature of stringers were placed upon the skids about eight feet apart, and with these as rails the way was used as a tramway for logging purposes. Persons traveled over it on foot, on horseback, and occasionally by team. The road terminated at tide water where the water is eight feet deep at high tide. The county never undertook to work or repair the road, although individuals did do some work upon it. The travel over it was in all respects similar to that over other logging roads in the same locality which were generally regarded by the public as private ways. For years this way has not been used for logging purposes. We think the evidence does not show an adverse user by the public which establishes a way by prescription. The travel over it began when it was used as a logging way, and it was then unquestionably regarded as a private way. The travel must have been permissive in its character then, and no action inconsistent with a mere permissive right or privilege to travel there

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was taken by the traveling public or by the appellant's officers or agents, until in the month of February, 1906, when the county's officers first asserted that it was a public highway. Thereupon the respondents erected gates across the road and placed sign boards there with words thereon in printed form, in large, legible letters, as follows: "Private Property. Please close the Gates." These gates were maintained by respondents until in March, 1907, when they were locked and fastened by respondents. The county caused the fastenings to be broken and the gates to be removed in April following. We think it is evident that the public generally did not regard the travel there as adverse. This is shown by the fact that other parts of this same logging road have been closed up by private owners, and no protest or complaint was made by the public or by the county authorities.

We think the judgment of the trial court is well sustained by the evidence, and it is affirmed.

FULLERTON, MOUNT, CROW, and ROOT, JJ., concur.

[No. 6821. Decided April 22, 1908.]

K. W. SHAFFORD, *Appellant*, v. J. M. BROWN *et al.*
*Respondents.*¹

AGRICULTURE—DESTRUCTION—INFECTED FRUIT—DAMAGES—LIABILITY—DEFENSES—STATUTES. In an action for damages for the destruction of fruit, an affirmative defense that the same was infected and its destruction necessary, and that it was condemned by defendant B., a county fruit inspector, and on appeal to the defendant H., the state commissioner of horticulture, the fruit was found infected and destroyed, is good as against a demurrer, although the law creating county fruit inspectors was unconstitutional; since the demurrer admits the infection and worthlessness of the fruit.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered March 2, 1907, upon overruling a

¹Reported in 95 Pac. 270.

demurrer to the answer, dismissing an action for damages for the destruction of infected fruit. Affirmed.

Fred Parker, for appellant.

The Attorney General, A. J. Falknor, Assistant, and R. G. Sharpe, for respondents.

Crow, J.—This was an action by plaintiff to recover damages for apples destroyed by defendants while assuming to act as county fruit inspector and state commissioner of horticulture, respectively. From a judgment of dismissal, plaintiff appeals.

In their answer respondents alleged as an affirmative defense that the apples destroyed were infected with pests injurious to the fruit interests of the state, and that the only way to avoid such injury was to destroy the infected apples; that respondent Brown, assuming to act as county fruit inspector, ordered the owners of the apples to destroy the same; that said owners appealed from Brown's decision to respondent Huntley as state commissioner of horticulture; that the latter immediately heard the appeal upon the merits and made a personal inspection of the fruit, and sustained the decision of Brown, and thereupon destroyed the infected apples. A demurrer was interposed to this defense, but was overruled by the trial court. Appellant then replied simply with a general denial of the allegations of the affirmative defense.

No statement of facts or findings have been brought to this court. The only question presented is as to the ruling of the court upon the demurrer.

This court, in the case of *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708, held that part of the act of 1903 (Laws 1903, p. 246, ch. 133), which assumed to create the office of county fruit inspector to be unconstitutional and void. By reason of this, appellant contends that the action of respondents in condemning and destroying this fruit was a trespass for which they must respond in damages to

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him as successor in interest to the then owners. This contention cannot be upheld. Respondent Brown was acting in good faith under a statute of the legislature. He doubtless supposed it to be a valid statute. The owners of the fruit evidently supposed the same. They recognized Brown as county fruit inspector by appealing from his decision to the state commissioner of horticulture. There is no question about respondent Huntley being such commissioner and authorized to perform the functions of that office. Upon a personal examination of the fruit, he found it infected. The affirmative defense alleged that the fruit was infected, and there is nothing to show that it was of any value. The judgment of the trial court is conclusive against appellant upon all of the material facts. The material allegations of the affirmative defense, for the purposes of the demurrer, must be assumed to be true. These recited that the fruit was infected and its destruction necessary. Assuming this to be true, the owners suffered no loss for which they could maintain an action. We think the demurrer was properly overruled.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and Root, JJ., concur.

[No. 6906. Decided April 22, 1908.]

J. D. BAUER, Respondent, v. P. F. WIDHOLM, Appellant.¹

TAXATION — FORECLOSURE — SUMMONS — SERVICE BY PUBLICATION — SUFFICIENCY. A summons by publication in a tax foreclosure is so indefinite that the judgment is void, where it fails to state the day upon which the service would be complete, as required by Bal. Code, § 1751, although the date of the first publication was stated.

JUDGMENT — COLLATERAL ATTACK — GROUNDS — WANT OF SERVICE. Where it is admitted that none but a void service of a summons by publication was made in a tax foreclosure, the judgment is void and may be attacked in an action to set it aside, although it recited that due service was made.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 29, 1907, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to vacate a tax foreclosure. Affirmed.

Totten & Rozema, for appellant.

Thomas & Rutherford and *J. D. Bauer*, for respondent.

CROW, J.—Action by J. D. Bauer against P. F. Widholm, to vacate and set aside a tax foreclosure, sale, and deed. The trial court overruled a demurrer to the complaint. The defendant elected to stand upon his demurrer, and judgment was entered in favor of the plaintiff. The defendant has appealed.

The only question before us is whether the trial court erred in overruling appellant's demurrer. The respondent in substance alleged that he had obtained title to a lot in the city of Seattle from one S. F. Shorey; that on November 23, 1900, a certificate of delinquency for the taxes of 1895 and 1896 was issued thereon to one Kenneth McCallum, who paid taxes for subsequent years, and on January 4, 1901, commenced an action against Richard Roe, and all persons unknown

¹Reported in 95 Pac. 277.

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claiming any title in and to the lot, to foreclose his lien; that service was made by the publication of a summons containing the following citation:

"You and each of you are hereby directed and summoned to appear within sixty days after the service of this notice and summons upon you, exclusive of the date of service, in the above entitled court, and defend the action or pay the amount due, together with the costs," etc.;

that no other service was made; that none of the defendants appeared; that the court had obtained no jurisdiction of the defendants or of the subject-matter of the action; that a default judgment of foreclosure was entered; that a sale had been made; that a tax deed had been issued to McCallum, who afterwards conveyed the lot to the appellant, Widholm; that a tender of the delinquent taxes, interest, penalty, and costs had been made to Widholm prior to the commencement of this action, and that the judgment and tax deed were void.

We will only consider the respondent's contention that the summons was void and not sufficient to confer jurisdiction. It was issued under §§ 96 and 97 of the act of 1897; Bal. Code, § 1751 (P. C. § 8692). It omitted any statement of, or reference to, the particular day upon which its service would be complete, and was therefore so indefinite and uncertain in fixing the time of appearance as to render it defective and avoid the judgment. *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606. The date of first publication was stated beneath the signature of the respondent's attorney, but this was not sufficient. *Dolan v. Jones*, *supra*.

The appellant contends that, as shown by the above cases, an irreconcilable conflict exists in former holdings of this court as to when service would be complete under the act of 1897, whether it would happen upon the first or the last date of publication. This suggests an immaterial point, as the

summons neither referred to the first nor the last publication as the date upon which its service would be complete, and was in any event fatally indefinite, uncertain, and defective by reason of such omission.

The judgment in the tax foreclosure recited that notice and summons had been duly and regularly served on each and all of the defendants, and the appellant now contends that it cannot be collaterally attacked in this proceeding. The complaint alleged that no service whatever had been made other than the one above mentioned, and that allegation was admitted by the demurrer. The foreclosure judgment was therefore entered without jurisdiction and, being void, was subject to the attack made upon it in this action. *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858.

The trial court committed no error in overruling appellant's demurrer to the complaint.

The judgment is affirmed.

HADLEY, C. J., MOUNT, ROOT, and FULLERTON, JJ., concur.

[No. 7083. Decided April 22, 1908.]

CASH MOORE, *Respondent*, v. THE NATIONAL ACCIDENT
SOCIETY, *Appellant*.¹

APPEAL—REVIEW—LAW OF CASE. Upon appeal from a judgment of nonsuit, in an action on an insurance policy, a decision that the defendant waived all other objections by denying liability because of want of timely notice, is the law of the case, and upon a retrial by stipulation, on the same record, the defendant cannot raise the objection that the action was not commenced within the time limited by law, not raised on the first trial, and is consequently confined to the sufficiency of the notice.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered April 17, 1907, upon findings

¹Reported in 95 Pac. 268.

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in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a policy of accident insurance. Affirmed.

Fred Parker, for appellant.

Austin Mires and Graves & McDaniels, for respondent.

CROW, J.—This action was brought by plaintiff to recover benefits under an accident insurance policy. Upon the first trial a judgment of nonsuit was rendered against plaintiff, which judgment was subsequently reversed by this court. 38 Wash. 31, 80 Pac. 171. Upon the remanding of the case, a second trial was had, resulting in a judgment in favor of plaintiff, from which defendant prosecutes this appeal.

Appellant raises but one question, to wit: "Was this action commenced within the time limited by the contract of the parties as expressed in the policy itself?" Respondent contends that this question was necessarily involved in the decision of the case upon the former appeal, and that its determination then against the present appellant is now conclusive. We think this contention must be unheld. Pursuant to stipulation of the parties, the last trial was had upon the same record and evidence used at the former trial. Hence if the form of the record and evidence could now present the question mentioned, it must have done so on the first trial and appeal. In its opinion upon the former appeal, this court said:

"As the company denied its liability and refused to treat with the insured on the ground of want of timely notice, its action amounted to a waiver of any other objection, and it is not now at liberty to vary its ground and insist that the appellant cannot recover because he failed to comply with some other condition of the policy."

There was consequently no question left for determination except that as to the sufficiency of the notice of the accident. The decision became the law of the case and conclusive against this appellant as to the question now sought to be raised.

Syllabus.

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Wheeler v. Aberdeen, 47 Wash. 405, 92 Pac. 135; *Grant v. Walsh*, 41 Wash. 542, 83 Pac. 1113.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and Root, JJ., concur.

[No. 7126. Decided April 22, 1908.]

A. D. HOWARD, *Respondent*, v. J. B. HANSON, *Appellant*.¹

REFERENCE—ORDER—COURT COMMISSIONERS—EXECUTION—SUPPLEMENTAL PROCEEDINGS—APPEAL—REVIEW—PRESUMPTIONS. An order in supplemental proceedings "to appear before S., court commissioner" for examination, will be considered as an order of reference to a court commissioner, especially where the court of original jurisdiction construed the same to have that effect; since the journal entry is only evidence of the court's action, and on appeal will be given the same interpretation as given by the lower court.

COURT COMMISSIONERS — APPOINTMENT — CONSTITUTIONAL LAW. Constitution, art. 4, § 23, providing that the superior judge may appoint one or more court commissioners with certain powers cannot be limited by an act of the legislature to superior courts in counties having a resident judge, but applies to superior courts in all counties.

SAME — POWERS — REFERENCE — EXECUTION — SUPPLEMENTAL PROCEEDINGS. Court commissioners are authorized to take evidence under an order of reference in supplemental proceedings and report thereon to the court, by virtue of Const. art. 4, § 23, conferring upon court commissioners the power to perform "such other business in the administration of justice as may be prescribed by law," and Bal. Code, § 4729, authorizing court commissioners to take testimony and proofs in all cases and report thereon, administer oaths and compel the attendance of witnesses.

EXECUTION—SUPPLEMENTARY PROCEEDINGS—JUDGMENT FOR COSTS—FORM. A judgment in supplemental proceedings requiring the judgment debtor to deliver certain personal property to the sheriff cannot require the payment of costs into court; but under Bal. Code, § 5327, a fixed sum may be allowed as costs, to be paid out of any money which may come to the hands of the sheriff or receiver within a specified time.

¹Reported in 95 Pac. 265.

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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered August 10, 1907, in favor of the plaintiff, upon the report of a court commissioner, in proceedings supplemental to execution. Reversed.

Merrick & Mills, for appellant.

Wm. Sheller (Cooley & Horan, of counsel), for respondent.

FULLERTON, J.—In 1905, the respondent recovered a judgment in the superior court of Snohomish county against the appellant for the sum of \$625.20. On January 16, 1907, he caused an execution to issue on the judgment, which was placed in the hands of the sheriff of Snohomish county for service. That officer was unable to find any property belonging to the appellant subject to execution, and returned the writ unsatisfied. The respondent thereupon instituted this proceeding under the statute relating to proceedings supplemental to execution, filing his affidavit to the effect that the appellant had property in Snohomish county which he unjustly refused to apply towards the satisfaction of the judgment. After the filing of the affidavit, the court made an order requiring the appellant to "appear at the court room of the Honorable John Sandige, court commissioner, on the 30th day of January, A. D. 1907, at the hour of 10 o'clock a. m. and that he then and there answer, before the said court commissioner, sitting as a representative of this court, concerning" any property he may have subject to execution for the satisfaction of the judgment mentioned. The appellant appeared personally and with counsel at the hearing, whereupon he was examined with other witnesses touching his property. At the close of the evidence the appellant objected to any further proceedings before the commissioner, on the following grounds:

"(1) That if said order of January 17, 1907, is an order of reference to John Sandige, as referee, it appears that the said John Sandige has never qualified by taking the referee's

oath as prescribed by law and that the parties have not expressly or at all waived the taking of such oath.

"(2) That if such order of January 17, 1907, is made to John Sandige, as court commissioner, the defendant objects to any further proceedings on the ground that in Snohomish county there is no court commissioner, there being resident in Snohomish county a judge of the superior court."

These objections were overruled by the commissioner, and a return made to the court to the effect that the appellant was the owner and in possession of fourteen shares of the capital stock of the Everett House Furnishing Company, a corporation, which he failed and refused to give up to execution; further reporting that he construed the order of the court referring the proceedings to him to be an order of reference to him as court commissioner, and not as a referee, and that he had acted accordingly. On the report of the commissioner the court entered the following judgment and order:

". . . . and the court having heard each of the parties in respect to said motion and having considered the return of the court commissioner, and his findings of fact and conclusions of law in the supplementary proceedings herein, together with the testimony taken upon the hearing in said supplementary proceedings, now being fully advised in the premises, it is now hereby ordered that the above named J. B. Hanson be and he is hereby directed and required within ninety days from and after the service upon him of this order to deliver up and surrender to the sheriff of Snohomish county, Washington, the certain certificate or certificates representing those certain fourteen (14) shares of stock owned and held by him in the Everett House Furnishing Company, a corporation, of Everett, Washington, the same, when so delivered by the said J. B. Hanson to said sheriff, to be by said sheriff disposed of in the manner provided by law.

"It is hereby further ordered that the above named plaintiff and judgment creditor, A. D. Howard, be and he is hereby allowed, as costs of said supplementary proceedings, the sum of \$25.00 and for disbursements incurred by him upon such hearing, the additional sum of \$47.35 incurred as stenographer's fees and \$2.20 incurred as sheriff's fees, and

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the said defendant, J. B. Hanson, is hereby directed and required to pay to the sheriff by said J. B. Hanson to be by said sheriff paid over to the above named plaintiff or his attorneys in satisfaction of said costs and disbursements herein allowed."

It is the appellant's first contention that there was no sufficient order of reference; that it is impossible to tell from the order made whether the reference was to a court commissioner or to a referee, and this being true it is void for indefiniteness. But clearly the order was an order of reference to a court commissioner. Not only is the person named called such in the order, but he is afterwards referred to as "said court commissioner." If, however, the order as entered were indefinite in this respect, it would not render the proceedings void. The journal entry of an interlocutory order is at most only evidence of the action of the court, and when it is of doubtful meaning the appellate court will give to it that interpretation which the court of original jurisdiction gives to it. Here the court of original jurisdiction treated the order as an order of reference to a court commissioner when objection was made to its form, and that being true, this court will give it the same interpretation, especially as the appellant was not misled by it.

It is next objected that the court of Snohomish county is without power to appoint a court commissioner. This contention is based on the fact that Snohomish county has a resident judge, and the further fact that the legislature has apparently sought to limit the power of the court to appoint a court commissioner to those counties in which there is no resident judge. But the power to appoint a commissioner is vested in the court by the constitution. Article 4, § 23 of that instrument reads as follows:

"There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge,

to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law."

This grant of power is supreme in the courts and the legislature is without power to take it away. It does not limit the right of the court to appoint a court commissioner to those counties in which there is no resident judge, and in so far as the legislature has attempted to so limit it, its act is invalid for want of power.

It is further contended in this connection that if it be held that the court had power to appoint a commissioner the commissioner is without power to hear a proceeding of this kind, since it is not included in the grant of powers conferred on court commissioners by the constitution. The powers there conferred, it will be observed, are (1) power to perform like duties as a judge of the superior court at chambers, (2) power to take depositions, and (3) power to perform such other business connected with the administration of justice as may be prescribed by law. What was intended by the constitution makers to be included in the first of these grants of power is not clear, as they had in a prior section of the constitution provided that the superior courts should always be open for the transaction of business, and thus eliminated the distinction that formerly existed between the powers of a judge during term time and his powers after the adjournment of the term, doing away with the sittings of the court at chambers altogether. Nor has this court been more happy in its attempt to elucidate its meaning. In *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397, it was intimated that the court commissioners have the powers that were formerly exercised by the territorial judges at chambers, while in *State v. Philip*, 44 Wash. 615, 87 Pac. 955, it was said that this was a strained construction of very plain language. Indeed, the latter case went further and intimated that, by the logic of some of our previous decisions, court commissioners had been eliminated entirely from our judicial system. But this, too,

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was evidently an inadvertence. There can be no doubt that court commissioners have the powers conferred by the second and third of the enumerated grants, even if the first be eliminated because of its indefiniteness. They can still take depositions, and perform such other business connected with the administration of justice as may be prescribed by law. Some question is here made as to the meaning of this latter clause, but we have no doubt it was intended to leave the legislature free to confer upon court commissioners such additional powers as the due administration of justice may from time to time require. Had the constitution provided for the appointment of court commissioners and enumerated their powers without going further, there would have been some question as to the authority of the legislature to add to these powers, and it was to remove this doubt that the clause was inserted. The legislature, therefore, has authority to give to court commissioners powers in addition to those specifically enumerated in the constitution, subject to the restriction that such powers shall be connected with the administration of justice. Acting under its authority the legislature has provided that every court commissioner shall have power:

“(2) To take testimony and proofs in all cases where the same is required by law, and in all matters in which information is required by the court, and report in writing his findings of fact and conclusions of law thereon to the judge of the superior court of the county;

“(3) To grant adjournments, administer oaths, preserve order, compel the attendance of witnesses, and to punish them for nonattendance or refusal to be sworn or to testify in the hearing of any matter before him as fully as the court or judge.” Bal. Code, § 4729 (P. C. §§ 4389, 4390).

These powers are ample to authorize the doing of everything that was done by the commissioner in the case at bar, even if the power so to do is not found in those especially enumerated in the constitution, and we therefore hold that he acted within the scope of his authority in the proceedings before us.

It is next objected that the evidence was insufficient to justify the findings of fact made by the commissioner and approved by the court. But without entering into an analysis of the evidence, we think it amply sufficient in that respect.

The last objection goes to the judgment, the contention being that it does not conform to the statute. This objection we think is well taken. The statute under which it was entered reads as follows:

"The judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witness fees and referee's fees and other disbursements, and of a sum in addition thereto not exceeding twenty-five dollars, and directing the payment thereof out of any money which has come or may come to the hands of the receiver or of the sheriff within a time specified in the order." Bal. Code, § 5327 (P. C. § 912).

This statute, it will be observed, empowers the court to allow a fixed sum as costs, which it may direct to be paid out of any money which has come or may come into the hands of the sheriff within a time specified in the order. The judgment as entered required the appellant to pay this sum into court. This was error. A formal judgment should be entered against the person liable for the costs, followed by a direction that the sheriff pay the judgment out of such money as has come or may come into his hands. The defendant cannot be directed to make the payment, and then be punished as for contempt if he fails so to do.

The judgment appealed from is reversed, and remanded with instructions to modify the judgment in the particular indicated in the foregoing opinion.

HADLEY, C. J., MOUNT, CROW, and ROOT, JJ., concur.

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[No. 7161. Decided April 22, 1908.]

JAMES COLEMAN, *Respondent*, v. MARTIN L. LARSON,
*Appellant.*¹

SPECIFIC PERFORMANCE—GIFTS—PROMISE TO CONVEY LAND—ACCEPTANCE BY ACTING UPON. A letter written to a brother in California asking "if he would be willing to make" his home with the writer in consideration of a deed of her home in Washington, supplemented by another setting forth the serious illness of the donor and urging him to come to her for the purpose of settling up her affairs, and which was accepted by letter as a gift on the conditions named, is a promise to make a gift which will be specifically enforced, when acted upon by the donee, with possession taken, and material changes made in his condition on the faith thereof.

SAME—INTENT OF DONOR—EVIDENCE. The fact that, after the arrival of the brother, the donor made him a deed of a portion only of the property, and attempted to sell the balance against his protests, would not show that she only intended to promise to give him part of the two lots on which the house was situated, where the entire lots were described in the first offer.

SAME—ESTOPPEL—ACCORD AND SATISFACTION. In such a case, the donee would not be estopped to assert his right to specific performance as to the whole tract, as against the donor's executor, by the acceptance and recording of a deed of part of the tract, delivered by the executor after the death of the donor, the donee having had no previous knowledge of such deed, and not accepting the same as a full settlement.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 14, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Andrew J. Balliet and James Kiefer, for appellant.

Bo Sweeney, for respondent.

FULLERTON, J.—This is an action brought to enforce an agreement for a gift of real property. In brief, the facts

¹Reported in 95 Pac. 262.

are these: In the latter part of the year 1906, one Mary Janson was the owner of lots 1 and 2, in block 3, of Queen Anne's Second Addition to the city of Seattle. The lots lay side by side and together made a tract 60 by 120 feet in size. There was but one house on the lots. This had been moved from the front to the rear 40 feet of the lots, leaving a space on the front 60 by 80 feet in size unoccupied. Mrs. Janson made her home in the house. She was well advanced in years, and in very poor health. The respondent in this action was her brother. He was then residing in the state of California, was possessed of a large family, and was in very poor circumstances financially. Anticipating her own death, and desiring to do something to ameliorate her brother's condition, Mrs. Janson conceived the idea of leaving him a part of her estate, which consisted of the real property mentioned and some personal property to the value of possibly \$3,000. In November, 1906, she gave oral directions to her attorney to write her brother and offer him her home on condition that he would come to Seattle to live. The attorney thereupon wrote the brother the following letter:

“November 13, 1906.

“Mr. James Coleman, Sr.,

“Glenbrook, Lake County, Calif.

“Dear Sir: Your sister, Mrs. Mary Janson, of this city, is endeavoring to arrange her affairs at this time, and asked me to write this letter to you to ascertain from you whether you would be willing to make your home in this city, Seattle, in consideration that she deeded to you as a gift, the home where she has been for some years, and is now living; the same to be your home. The lot is 60x120 feet. Is good property, and has a cottage on it with modern plumbing in it. Please answer me at once on receipt of this. Mrs. Janson has been ill for some time, and is quite ill at this time, and may not last many more days longer. Her condition is such that she may pass away at any moment. Yet, on the other hand she may live for several months. Yours truly,

“Andrew J. Balliet.”

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Three days later she procured a friend to write to him another letter, fearing the attorney might overlook the matter. This letter was as follows:

“Seattle, Nov. 16, 1906.

“Mr. James Coleman:

“At the request of your sister, Mrs. Mary L. Janson, I write to tell you that she is very ill, has had two light strokes of paralysis, and may have another one at any time. And she is very anxious to see you and wants you and wife to come to her at once. If you decide to come, telegraph at once, and she will telegraph tickets for you and your wife. Do not delay for she is very anxious to get her business settled and if you are here it will simplify business that she wants to settle for you. Telegraph at once on receipt of this letter. Respectfully,

Mrs. M. A. Morse.”

To the attorney's letter the brother replied as follows:

“527-8-9 Coleman Bldg., Tel. Main 4321.

“Andrew J. Balliet, Esq., Attorney-at-Law, Seattle, Washington.

“Dear Sir: I received your letter of Nov. 13 on Nov. 18, 1906. I wrote a letter to my sister, Mrs. L. Janson about four days ago and told her that I would try and go up there to see her and start on Wednesday the 21st of November. Dear Sir, you can tell my sister Mrs. L. Janson I will except her kind offer and hope she will be better by the time I get up there. Yours truly, James Coleman, Sr., Glenbrook, Lake County, California.”

The brother left with his wife for Seattle at the date named in his letter, arriving there shortly after his letter arrived, and at once took up his abode with his sister, where he continued to reside until her death, which occurred on January 21, 1907. Shortly after his arrival, Mrs. Janson executed a deed in his favor, conveying to him the east 40 feet of lots 1 and 2 in the block above named, delivering it to her executor with instructions to deliver it to her brother after her death. She also at the same time executed a bill of sale in his favor of all her household furniture, which she likewise delivered to

her executor with the same instructions. These instruments were delivered to the brother within a few hours after Mrs. Janson's death. The brother shortly thereafter began this action to enforce a conveyance to him of the remaining 60x80 feet.

It is not shown that the respondent knew anything of the contents of the deed and bill of sale prior to his sister's death, or that he knew of their existence other than in a very general way. Declarations of the sister to the effect that she had given the entire property to her brother, made shortly prior to her death, were shown; also, that in speaking of the place she called "home," she would indicate the entire property. It was shown, however, on the part of the executor, that she offered the land in dispute for sale even after the arrival of her brother in Seattle, and that the brother remonstrated against any sale of the property by her, claiming that it was his by gift. The will of the sister, while disposing of all her remaining property specifically, makes no mention of this real property; it passed under the will, if by will at all, by virtue of the general residuary clause. The trial court held that the respondent was entitled to a conveyance of the remaining part of the two lots, and entered a judgment accordingly. The executor appeals.

It is the appellant's contention that the letter of the attorney did not constitute an offer on the part of Mrs. Janson to convey her home to the respondent in consideration that he would come to Seattle to reside, but was rather in the nature of a preliminary inquiry by which it was sought to ascertain whether or not the respondent would accept of such a proposition should she afterwards make it, and, being so, there was no agreement to give him the land which can be specifically enforced. Unquestionably the letter is capable of that construction, and, standing alone, might properly be so construed, but the surrounding circumstances make it clear that this was not Mrs. Janson's intention. Her repeatedly expressed desires to do something in aid of her brother, to-

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gether with the letter written through Mrs. Morse, make it clear that she intended to proffer him a gift of her home if he would come to Seattle to reside. The respondent was justified in treating it as an offer to give him the property on the conditions named, and when he accepted the offer and performed the conditions, it became a binding contract which equity will enforce. An agreement for a gift of land will not, of course, be enforced on proof alone of the promise to give. This is true whether the promise be oral or in writing. But where the promisee accepts the promise, enters into possession and makes improvements on the land, or does some other act on the faith of the promise which materially changes his condition, the promisor will be required to make good the gift.

We think also the original offer was intended to include the entire property. The letter of the attorney unmistakably includes the whole of it, but the instructions given the attorney were not specific; he was directed to make an offer of "the home," or "this home," and it is thought that the deed she left indicates that her meaning was different from that expressed in the letter. But this description in the deed appears to be an afterthought on her part, arising from the fear that the means she had on hand would not suffice to care for her during her last sickness, and that it might be necessary to sell a portion of the lots to procure additional money for that purpose. But this change of mind could not affect the respondent's rights. If she offered him the entire property on terms that required some change of condition on his part, and he accepted those terms, the gift was complete and could not be afterwards modified by her.

At the delivery of the deed and bill of sale to the brother on the death of his sister, he made no objection to the instruments because of the description of the property, but accepted and recorded them, giving to the executor a writing acknowledging their receipt by him. This is now thought to estop him from claiming a conveyance of the remainder of the lots,

but manifestly his conduct did not work an estoppel. His conduct could amount to an estoppel only in the case that he agreed to take a part for the whole in settlement of the dispute between the parties, but there is no evidence whatever that such was the condition on which he accepted these papers.

The judgment is affirmed.

HADLEY, C. J., MOUNT, CROW, and ROOT, JJ., concur.

[No. 7016. Decided April 22, 1908.]

BRACE & HERGERT MILL COMPANY, *Appellant*, v. THE STATE OF WASHINGTON, *Respondent*.¹

NAVIGABLE WATERS—TITLE TO BEDS—RIPARIAN OWNERS—SHORE LAND. The constitutional assertion by the state of ownership in the beds and shores of navigable lakes up to and including the line of ordinary high water vests the title thereto in the state, and the upland owners have no riparian rights therein by virtue of patents from the United States, except that patentees take title up to the meander line if the same was run below high water mark.

SAME—LAKES—NAVIGABILITY. A lake with an area of nine hundred acres, five hundred of which is of a depth of twenty-five feet, used even to a limited extent by the public for navigation, and the shores of which were meandered by the government by lines which did not include the bed of the lake in any of the grants, is a navigable lake.

ADVERSE POSSESSION—AGAINST STATE—SHORE OF NAVIGABLE LAKE—OWNER OF UPLAND. Adverse possession of the bed or shores of a navigable lake below the line of high water does not run against the state, in view of the fact that, after the state's constitutional assertion of title thereto, the legislature passed laws uniformly recognizing the rights of the many persons in possession of such shore lands at the time of the adoption of the constitution, giving them the preference right to purchase the same when the land shall be put on the market, or requiring the purchaser to pay for the value of the improvements thereon; since the possession thereby became permissive.

¹Reported in 95 Pac. 278.

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SAME—PAYMENT OF TAXES. The statute of limitations respecting the adverse possession of land and the payment of taxes for seven years expressly provides that it does not apply as against the state.

SAME—ESTOPPEL. The state is not estopped to assert title to the bed of a navigable lake by the fact that it has permitted improvements thereon by one in possession and stood by while the same was conveyed and taxes were paid for many years.

BOUNDARIES — NAVIGABLE WATERS — SHORES — ASCERTAINMENT. That the true high water mark of a navigable lake was rendered difficult of ascertainment by the acts of one in possession, does not entitle the state to have the same established at the government meander line, where the meander was admittedly many feet distant from the original high water mark; and therefore the state cannot complain of the adoption of a conventional line which is approximately correct.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered April 29, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

H. A. P. Myers, for appellant.

The Attorney General, A. J. Falknor, Assistant, and R. G. Sharpe, for respondent.

FULLERTON, J.—This is an action to quiet title to real property, brought by the Brace & Hergert Mill Company against the State of Washington. In its complaint the mill company alleged that it was the owner in fee simple of the west half of block 94, in D. T. Denny's First Addition to North Seattle; all of block A, in D. T. Denny's Sixth Addition to North Seattle; and all of lot 12, in block 1, and lots 1, 2, 3 and 4, in block 3, of Mercer's Water Front Addition to the city of Seattle; and that it was in the possession of such property, and had been in the open, public, notorious, adverse and actual possession thereof for more than ten years prior to February 26, 1903. It further alleged that the state of Washington claimed some interest in the property described, but that such claim was without right.

The state for answer denied the allegations of the complaint, save the allegation that it claimed the property and the allegation that the mill company was in possession thereof, and for a further and separate answer alleged that all of the lands described in the complaint were shore lands, lying below the line of ordinary high water in the bed of Lake Union, a navigable meandered lake; that such land became its property on its admission into the Union as a state, and that it had never parted with its title to the same. It further alleged that the mill company's possession of the property had not been adverse to it, but in virtue of its laws granting a preference right of purchase to occupants who had placed on such lands, prior to March, 1889, valuable improvements which were in actual use for commerce, trade or business. In reply the mill company deraigned its title, showing that a link therein consisted of a mortgage and its foreclosure in the courts of the United States; that it had paid taxes on the property to the county and state ever since they had been in possession, and alleged again that it had been in adverse possession of the property for the statutory period.

The evidence tended to show that the lands in dispute bordered on the shores of Lake Union, and were platted into lots and blocks as parts of the Donation Land Claims of D. T. Denny and Thomas Mercer. That lot 12, in block 1, and lots 1, 2, 3 and 4 of Mercer's addition were wholly in the bed of Lake Union, below the line of ordinary high water mark as it exists at the present time; that the west half of block 94 of Denny's addition is entirely above that line; that block A of the same addition is partly above and partly below such line. It appeared also that Lake Union is a fresh-water lake of irregular shape, having an extreme length north and south of some two and one-fourth miles, with an extreme width of about seven-eighths of a mile; that it has a total area of some 905 acres, some 499 acres of which has a depth of over 25 feet, with a maximum depth of 60 feet. Boats of considerable dimensions, as well as many smaller craft, have

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at different times plied upon its waters; booms of logs, piles, shinglebolts and other timber products have been transported from place to place thereon, as well as moored in booms while awaiting the process of manufacture.

In 1852 or 1853, a dam was thrown across the outlet of the lake, causing the waters therein to rise some 11 feet above its general level. While this dam was still standing, a meander line was run to mark the shore line of the Denny and Mercer Donation land claims. This meandered line shows the shore line to have been entirely south of block 94, leaving the entire property in question in this action in the bed of the lake below the line of high water mark. A second meander line, also run by the government surveyors, although it does not strictly correspond with the first, shows the same thing; but the recorded plats of Denny's Additions show the shore line to pass through block 94 somewhere near the center of the block, leaving the north half of block 94, with the other described lands, below the line of ordinary high water. The dam mentioned went out in part some few years after its construction and was not rebuilt, and later on the balance of it went out, leaving the water level of the lake substantially as it was originally.

The present shore line, as found by the court, lies entirely below block 94, passing through block A in a diagonal direction, running from a point 30 feet north of the southwest corner of the block to a point 170 feet north of its southeast corner. On the question of possession, the evidence tended to show that the lands in dispute had been in the possession of the mill company and its predecessors in interest since early in territorial days, and there was evidence, although not uncontradicted, that the owners claimed adversely to the state for a period of more than ten years prior to February 27, 1903, the date the act relieving the state from the operation of the general statute of limitations went into effect. It was further shown that the mill company, and its predecessors in interest, had placed improvements upon the lands in question

having an aggregate value of some \$85,000, and that a considerable part of such improvements were upon that part of the land the court found to be shore lands. It was shown also that these, as well as some of the adjoining lands, had been filled to a considerable depth by the mill company, and that its action in this regard made it difficult if not impossible to trace with precision the shore line as it originally existed, or would now exist but for such fills.

On the foregoing record the trial court found that Lake Union was a navigable body of water the property to the beds and shores of which was in the state of Washington; that the line of ordinary high-water marked the boundary between the uplands and the shore lands, rather than the meander line run by government surveyors; that the mill company had acquired no title to the shore lands by its possession; that the state had acquired no title to the lands lying between the shore line and the meander line as the court had located it; that, of the lands in dispute, all of block A that lay to the north of that line, together with lot 12, in block 1, and lots 1, 2, 3 and 4 of Mercer's Water Front Addition to the city of Seattle, were shore lands belonging to the state of Washington, and that all of block A lying south of the line described, together with the west half of block 94, were uplands and the property of the mill company. It entered a decree in accordance therewith, from which both parties appeal.

Taking up the questions suggested by the appeal of the mill company, the first to be noticed is the contention that the property in dispute, both above and below the line of ordinary high water of the lake, passed by the patents from the government of the United States to Denny and Mercer, and from them by mesne conveyances to the mill company. In other words, the contention is that the upland owner on a navigable body of water has, in virtue of his patent from the United States, the right of a riparian proprietor in the water on which his lands borders—a right which the state cannot by

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its laws take away. This question, in so far as it is within the powers of the courts of this state to determine it, has been determined against the appellant's contention. In its constitution the state asserted ownership in the beds and shores of all navigable waters of this state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. By a uniform course of decision this court has held that this declaration vested title in the lands claimed in the state. It was so held with reference to the tide lands in the following cases: *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Pierce v. Kennedy*, 2 Wash. 324, 26 Pac. 554, 28 Pac. 35; *Baer v. Moran Brothers Co.*, 2 Wash. 608, 27 Pac. 470; *Board of Harbor Line Com'rs v. State ex rel. Yesler*, 2 Wash. 530, 27 Pac. 550; *State ex rel. Stimson Mill Co. v. Board of Harbor Line Com'rs*, 4 Wash. 6, 29 Pac. 938; *State ex rel. Columbia & P. S. R. Co. v. Board of Harbor Line Com'rs*, 4 Wash. 816, 30 Pac. 734; *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Lownsdale v. Grays Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663; *Sullivan v. Callvert*, 27 Wash. 600, 68 Pac. 363. And with reference to shore lands, or lands on which the tide did not ebb and flow, in the following cases: *McCue v. Bellingham Bay Water Co.*, 5 Wash. 156, 31 Pac. 461; *Washougal & La Camas Transp. Co. v. Dalles etc. Nav. Co.*, 27 Wash. 490, 68 Pac. 74; *Kalez v. Spokane Val. Land etc. Co.*, 42 Wash. 43, 84 Pac. 395; *Van Siclen v. Muir*, 46 Wash. 38, 89 Pac. 188; *Muir v. Johnson*, ante p. 66, 94 Pac. 899.

The statement that the line of ordinary high water marks the boundary of the upland grant is of course understood with the modification that the meander line established by the government does not run below that line; we have held, in obedience to another clause of the constitution disclaiming title in tide and shore lands where the same had been patented

prior to the adoption of the constitution, that, where it does run below the line of ordinary high water, such line marks the boundary of the upland grant. *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726; *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098; *Washougal & La Camas Transp. Co. v. Dalles etc. Nav. Co.*, and *Van Siclen v. Muir*, *supra*. But subject to this modification, the rule is unqualified that the upland owner as such has no proprietary interest in the tide or shore lands bordering such uplands.

It is said, however, that the decisions of this court are in violation of the Federal laws under which the lands were granted to the upland owner; but we cannot so regard them. Unquestionably, the supreme court of the United States has uniformly held that grants of uplands bordering on navigable waters convey to the grantee title down to the line of ordinary high water of such navigable waters, but they have just as uniformly held that the answer to the question whether it conveys more than this, depends upon the local law of the state wherein the granted lands lie. If the local law recognizes such grants as extending to low water mark or to the thread of the stream, it will be so recognized by the Federal authorities; but if the state limits the grant to the line of ordinary high water, as our state does, this line will be held to mark the boundary of the grant. This is founded on the principle that the shores and beds of all bodies of water, whether navigable or unnavigable, belong to the state on which they are situate, and that it is for the state to say whether or not it will assert its title to such shores and beds, or whether it will surrender them to the upland proprietor. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 937, 34 L. Ed. 941; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Shively v. Bowelby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. This state, as we have shown, asserted its right to these shores and beds of its navigable waters in its

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constitution. There can be, therefore, no question that its right thereto is paramount to any claim made by an upland owner in virtue of his patent from the United States.

The next contention is that Lake Union is not navigable in fact, and for that reason the grant of the uplands extended to the center of the lake. But on this question we likewise entertain no doubt. That the lake is capable of being navigated there is no question at all—the claim that it is not navigable being based on the fact that its size renders it of but little use for the purposes of navigation. But the fact that it is not much used does not conclude the question. Since it is capable of being navigated and is used by the public for that purpose, even though to but a limited extent, the courts cannot say that the private rights of the upland owners are superior to the rights of the general public therein. Moreover, there is no equity in the claim of the upland owner. The government did not extend its surveys across the lake, nor did it include the bed of the lake in any of the grants made of the upland surrounding it. On the contrary, the government, when it disposed of the soil surrounding the lake, treated the lake as a navigable body of water, the title to the bed and shores of which it held in trust for the future state of Washington, and, in so far as it could do so, it passed the title to these beds and shores to the state of Washington on its admission into the Union as little encumbered by the rights of the surrounding property owners as it did any others of the tide and shore lands. *Madson v. Spokane Valley Land etc. Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A., N. S., 5; *Kalez v. Spokane Valley Land etc. Co.*, 42 Wash. 43, 84 Pac. 395.

The appellant next contends that it has title under the statute of limitations. By the general statute of limitations, brought over from territorial days, it was provided that actions for the recovery of real property, or for the recovery of the possession thereof, must be brought within a period of

ten years. Bal. Code, § 4797 (P. C. § 280). Another section, from the same source, reads as follows:

"The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed." Bal. Code, § 4807 (P. C. § 291).

The section first cited is still the law of the state, and the latter continued to be until February 27, 1903, when it was amended so as to read as follows:

"The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or *quasi* municipality of the state, in the same manner as to actions brought by private parties: *Provided*, That there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: *And further provided*, That no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed." Laws 1903, p. 26.

It is at once apparent that, if it was within the power of the state to remove the bar of the statute by legislative act after the bar had become perfect, the appellant has no standing on this branch of its case, as it is clear that the legislature by this act attempted to do that very thing. But since the appellant denies to the state that power, we will not examine the question, as there is another ground free from any constitutional objection on which a decision against the contention may rest. That ground is that the statute upon which the appellant relies is not applicable to this character of property. The statute of limitations, it must be remembered, does not run against the state except with the state's

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consent. When the state acquired its tide and shore lands on its admission into the Union, it found them in a large part in the possession of individuals who had erected and were maintaining thereon structures of various sorts, many of which were costly and valuable. Some of them were of a public nature, such as wharves, docks and warehouses, useful to the public as an aid to trade and commerce. Others again were of a private nature, such as sawmills, shingle mills, and structures in which were manufactures of various sorts; and still others, again, were mere highways from the upland to deep water. After the state had asserted its title to these lands, the legislature recognized that these persons had substantial rights in their improvements which were entitled to protection, and to that end it gave them preference rights of purchase when the land should be put on the market for sale. It provided, furthermore, that when such lands should be purchased by one not the owner of the improvements, the purchaser should pay the value of the improvements to the state for the use of the owner as an additional part of the purchase price. While no specific enactment on the subject of possession was made, the statute uniformly recognized this right to be in the owner of the improvements. For example, § 11 of the Laws of 1889-90, page 435, the first enactment upon the subject, reads as follows:

“The owner or owners of any lands abutting, or fronting upon, or bounded by the shore of the Pacific ocean, or of any bay, harbor, sound, inlet, lake or watercourse shall have the right for sixty (60) days following the filing of the final appraisal of the tide lands to purchase all or any part of the tide lands in front of the lands so owned: *Provided*, That if valuable improvements in actual use for commerce, trade or business have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid.”

The act of 1895, § 74, page 559, the first reenactment of the statutes, contained the following:

"Any person the owner of the abutting upland [to shore lands] shall have the preference right for sixty days following the filing of the plat and appraisement with the commissioner of public lands, to purchase the lot or block of land in front of the upland so owned by him: *Provided*, That if valuable improvements were, prior to March 26, 1890, in actual use for commerce, trade or business, made on any lands, the owner or owners of such improvements shall have, for the period aforesaid, the exclusive right of purchase during the period aforesaid of the lands so improved, and sufficient additional ground for the reasonable use of said improvements."

And the act of 1897, page 250, § 45, the law now in force, contains this provision:

"The owner or owners of lands abutting or fronting upon tide or shore lands of the first class shall have the right for sixty days following the filing of the final appraisal of the tide and shore lands with the commissioner of public lands to apply for the purchase of all or any part of the tide or shore lands in front of the lands so owned: *Provided*, That if valuable improvements, and in actual use prior to March 26, 1890, for commerce, trade, residence or business have been made upon said tide or shore lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to apply for the purchase of the land so approved for the period aforesaid. . . ."

These statutes, it seem to us, when considered in connection with the conditions existing at the time of their enactment, evidence a clear intent on the part of the legislature that improvers of tide and shore lands shall not be disturbed in the possession of their improvements until the land on which the improvements are situated has been placed on the market for sale, and the time given them within which to exercise a preference right of purchase has expired. And this being true, it must follow that the state intended such possession to be permissive until such time; that it intended to withdraw, in so far as these lands were concerned, the consent formerly given that the general statute of limitations should operate against it. Therefore, since the lands in question were finally appraised and placed on the market for sale about the time

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this action was commenced, the statute had not run in the appellant's favor.

Nor is the appellant aided by the statute relating to possession under color of title and the payment of taxes for seven consecutive years. That statute expressly provides that it "shall not extend to lands or tenements owned by the United States, or this state, nor to school lands, nor to lands held for any public purpose." Laws 1893, page 20.

Lastly, it is asserted that the state is estopped from asserting title to the property in question. This contention is founded on the fact that the state has not interfered with the appellant's use of the property, but has stood by and raised no question while the appellant and its predecessors in interest have mortgaged and sold the property, paid taxes thereon, and otherwise treated it as their own. But acts of this character do not amount to an estoppel as against the state. The state at all times has recognized that the appellant had a property in its improvements, and this property it recognized the right to dispose of as it pleased. The improvement was property subject to taxation, and it could be no waiver of the state's title to the land to assess and collect taxes upon the appellant's interests therein. If the authorities sought to tax the appellant for something it did not own, the proper remedy was to object before the taxing board.

The state appeals from the judgment of the court establishing the line of ordinary high water, as it found it to exist at the present time, as the boundary line between the shore and the uplands. This line, as we have before stated, could not be determined with accuracy, owing to the fact that the mill company and their predecessors in interest had obscured it by fills which raised the surface above the present water level. The state contends that since the true line cannot be definitely known because of those acts of the mill company, the court should have adopted the government meander line as the true line, in which event all of the land in dispute will be found within the boundaries of the state's property. But the me-

ander line is concededly many feet from the true line, while the line adopted by the court is approximately upon it. The fill complained of did not obscure the line entirely; it simply made it difficult to follow its sinuosities, resulting in the adoption by the court of a conventional line between the two points in dispute. As there is no evidence that the state is the loser by this rule of the court, we see no necessity for disturbing it.

The judgment appealed from is affirmed.

HADLEY, C. J., MOUNT, CROW, and ROOT, JJ., concur.

[No. 7056. Decided April 24, 1908.]

ARTHUR F. HEMENWAY, Respondent, v. WASHINGTON WATER POWER COMPANY, Appellant.¹

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$7,500 reduced by the trial court to \$5,000, is excessive and a new trial will be granted on appeal unless all but \$2,500 is remitted, where it appears that the plaintiff, an able-bodied carpenter thirty-two years of age, was injured in the groin in a street car collision, that he was confined to his bed more than a week, and up to the time of the trial, eight months thereafter, had been unable to work, continuously suffered pain, and could walk with difficulty, and one physician testified that his spine was permanently injured, but the great weight of the evidence indicated no permanent injury and the jury appears to have been influenced by passion or prejudice.

Appeal from a judgment of the superior court for Spokane county, Joiner, J., entered February 28, 1907, upon the verdict of a jury rendered in favor of the plaintiff, for \$5,000 damages for personal injuries sustained by a passenger in a street car collision. Affirmed on condition of remitting \$2,500.

H. M. Stephens, for appellant.

A. E. Barnes and *Geo. A. Latimer*, for respondent.

¹Reported in 95 Pac. 269.

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Opinion Per MOUNT, J.

MOUNT, J.—This is an action for personal injuries. The case was tried to a jury. A verdict was returned in favor of the plaintiff for \$7,500. Upon a motion for a new trial, the trial judge required the plaintiff to remit \$2,500 from the verdict or submit to a new trial. The plaintiff made the remission, and the judgment was thereupon entered for \$5,000 in favor of the plaintiff. The defendant appeals from that judgment.

The only question argued upon this appeal is that the judgment is excessive. The evidence shows that the respondent was injured by the collision of two of appellant's street cars, upon one of which respondent was a passenger. At the time of the collision, the respondent was standing on the rear of the car, and by the impact of the collision, was thrown against the seats, which struck him in the groin, and that he was thrown down upon the seats and into the aisle of the car; that the injury made him sick, and he was confined to his bed for more than a week; that up to the time of the trial, which occurred about eight months after the accident, he had not been able to work at his trade which was that of a carpenter. He had, however, been engaged in the real estate business for three or four months. At the time of his injury respondent was a young man thirty-two years of age, and was employed at the rate of \$3.60 per day. Subsequently, wages were increased to \$4 per day. Prior to the injury he was a strong, able-bodied man, and since that time to the time of the trial he had continuously suffered pain and could walk with difficulty. At the time of the injury and several times afterwards, he was examined by certain doctors, none of whom were able to find any bruises or objective evidences of injuries upon his person.

It was the theory of the plaintiff that he received an injury to his spinal cord, which would be permanent. One of the doctors, called by him as a witness, testified at the trial that, in his opinion, the injury was to the spinal cord, and that the injuries would remain permanently. Several other

doctors, who examined the respondent carefully several times, testified that there was no permanent injury and no evidences of injury to the spinal cord. We have examined the evidence carefully and are of the opinion that the great weight thereof indicates that there is no permanent injury to the respondent. The size of the verdict returned by the jury would seem to indicate that they might have found that the respondent was permanently injured. But whether so or not, the trial judge was of the opinion that the verdict was excessive, and in that opinion we concur. If there were no permanent injuries caused to respondent by the collision, it seems clear to us that \$5,000 is still excessive, and that one-half of this amount would be a liberal compensation for the injuries which he has suffered. So large a verdict as the one returned by the jury upon the facts in evidence in this case indicates to us that the jury were influenced by passion or prejudice, and that either a new trial should be granted or we should reduce the amount of the verdict to what seems to us a fair amount.

The judgment appealed from will therefore be reversed and a new trial granted, unless the respondent, within thirty days after the remittitur is filed below, shall file a remission of \$2,500 from the judgment entered, and agree to a judgment for \$2,500, in which event the judgment will stand affirmed for that amount; appellant to recover costs on this appeal.

ROOT, FULLERTON, and CROW, JJ., concur.

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Opinion Per MOUNT, J.

[No. 7100. Decided April 24, 1908.]

MARY MOYLAN, as Administratrix etc., Respondent, v. JOHN MOYLAN et al., Appellants.¹

ACTIONS—JOINDER. Under Bal. Code, § 4942, causes of action upon two distinct contracts may be joined in one action.

APPEAL—REVIEW—FINDINGS. Findings of a trial court which are supported by the evidence will be affirmed where the supreme court is not satisfied that they are erroneous, or that the evidence, in case of conflict, preponderates against them.

INTEREST—MONEY PAID. In an action to recover money paid by mistake, interest is allowable from the time of demand made for specific amounts.

WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED. In an action by an administrator to recover money paid by the deceased upon a settlement, a question as to what transpired at the settlement and all about it, is objectionable, as calling for statements made by the deceased, contrary to Bal. Code, § 5991.

JUDGMENTS—RENDITION—TIME FOR. A judgment is not void because not rendered within ninety days after the trial, nor does that of itself constitute reversible error.

NEW TRIAL—GROUNDS—DISCRETION. It is discretionary to deny a new trial on the ground that the stenographer had lost his notes, the appellant offering to pay all costs in order to get a correct record.

Appeal from a judgment of the superior court for Lincoln county, Kennan, J., entered May 24, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Neal, Sessions & Myers (H. A. P. Myers, of counsel), for appellants.

Merritt, Hirschman, Oswald & Merritt, for respondent.

MOUNT, J.—This action was brought by the respondent against the appellants, to recover the sum of \$2,150, alleged to be due upon two causes of action. The lower court, after

¹Reported in 95 Pac. 271.

a trial, entered judgment in favor of the plaintiff upon both causes of action for \$1,948.50. The defendants appeal.

Mary Moylan, the respondent, is the administratrix of the estate of Daniel Moylan, deceased. She is the widow of the deceased. The appellant John Moylan and the deceased, Daniel Moylan, were brothers. They were copartners in a farming business for several years prior to December, 1902. The complaint alleged as a first cause of action, in substance, that the two brothers were engaged in business as partners prior to December 20, 1902, when on that day the copartnership was dissolved by mutual consent and a settlement was made between them; that it was then agreed if any mistake had been made in such settlement it should be corrected. Soon afterwards Daniel Moylan discovered that a mistake had been made against him amounting to \$1,350, and immediately notified his brother thereof.

The second cause of action alleges the sale to appellant of a one-third interest in certain lots of land of the value of \$800. The appellants demurred to the complaint upon the ground, among others, that several causes of action were improperly united in the complaint. This demurrer was overruled. The appellant thereupon answered, admitting that the settlement had been made, but denying that any mistakes had been made therein, and admitted that on June 23, 1903, the respondent and her husband Daniel Moylan, who was then alive, made a deed of the lots in question to the appellant, but alleged affirmatively that the lots were formerly owned by John Moylan, Daniel Moylan, and Dennis Moylan, brothers, who inherited the lots from a brother Timothy; that the consideration for the deed from Daniel and wife to John was the fact that John had cared for his mother for many years prior to her death, and that the deed was made in consideration thereof at the suggestion of Daniel and Dennis Moylan. This affirmative matter was denied. The cause was tried to the court without a jury, commencing on June 5, 1906. The judge thereafter did not announce his decision until May 24,

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1907, when findings of fact and conclusions of law were made in favor of the respondent, to the effect that, at the settlement made between appellant and Daniel Moylan, the latter had paid to the appellant \$6,270, which was \$1,293.27 more than he should have paid, and also that the agreed value of the lots was \$250 for respondent's one-third interest. The judgment was entered for these amounts with interest.

Appellants claim on this appeal that the court erred in denying the demurrer to the complaint, for the reason that the two causes of action stated cannot be joined in the same complaint. Both causes of action are upon contract and may clearly be joined under the provisions of Bal. Code, § 4942 (P. C. § 412).

Appellants next contend that the evidence is insufficient to show that a mistake was made in the settlement between the brothers. The appellant John Moylan was a witness and admitted that, within a few days after the settlement was made, his brother Daniel claimed that mistakes had been made, and requested the appellant to correct the errors; that, after the death of Daniel, the widow and a brother of the widow upon different occasions made similar demands, which appellant rejected. There is evidence in the record to support the findings and conclusions of the trial court, and we are not satisfied on this appeal that his findings are erroneous. They must therefore be taken as correct.

Appellants also contend that the evidence is insufficient to support the finding that they agreed to pay \$250 for a one-third interest in the lots, as alleged in the second cause of action. The evidence is in direct conflict upon this question, and we are unable to say that it preponderates against the finding, and for that reason we shall not disturb the court's finding.

It is alleged that the court erred in allowing interest on the amounts found due on each cause of action. The record shows that, within a few days after the settlement, Daniel notified the appellant that a mistake had been made, and de-

manded by letter a return of the money, and subsequently other demands were made for specific amounts. Under these circumstances it was not error to allow interest on the amounts found due.

Appellants argue that the court erred in sustaining an objection to a question put to appellant while he was upon the witness stand as follows: "State what transpired at the time of the settlement and all you remember about it." This question was objected to because it called for a conversation with Daniel Moylan, deceased, and the objection was sustained on that ground. This question was general and called for everything that transpired at that time and included private statements of the deceased. As framed, the question was clearly objectionable under the statute, Bal. Code, § 5991 (P. C. § 937), and the court did not err.

Appellant argues that the judgment is erroneous because it was not rendered within ninety days after the trial. We held in *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362, that such judgments were not void, and that the court did not lose jurisdiction by reason of delay. The mere fact that the judgment was not rendered within ninety days does not of itself constitute error upon which the judgment may be reversed.

It is claimed that the court erred in refusing to grant a new trial. It seems that, after the trial, the stenographer who had taken down the evidence in shorthand lost the notes. After an adverse decision, the appellants made application for new trial, and offered to pay all the costs of such new trial in order to get a correct new record. The court refused this application. This was clearly within the discretion of the trial court, and was not an abuse of such discretion.

The judgment must therefore be affirmed.

HADLEY, C. J., CROW, ROOT, RUDKIN, FULLERTON, and DUNBAR, JJ., concur.

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Opinion Per Mount, J.

[No. 7194. Decided April 24, 1908.]

WILLIAM H. HARRIS, *Respondent*, v. WASHINGTON PORTLAND
CEMENT COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURIES TO SERVANT—KNOWLEDGE OF DANGER—EVIDENCE—QUESTION FOR JURY. The positive statements of an employee that he did not know of the danger from an effort being made to raise a water gate, are not overcome by proof of minor facts which he might have noticed and indicating to him that such attempt was being made, considering his position and the roar of the water, and the question is therefore for the jury.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. It is harmless to exclude a question on cross-examination as to the time a certain event had taken place, where it had been in substance answered many times by the witness.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—RELEVANCY. An instruction that plaintiff cannot recover if he voluntarily adopts an unsafe method where there was a safe way, need be given only where there are obviously two ways of doing the act.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered July 15, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

R. S. Eskridge, Philip Tindall, and Smith & Brawley, for appellant.

Robert H. Lindsay and Frederick R. Burch, for respondent.

MOUNT, J.—The plaintiff in this case recovered a judgment for \$8,000, for the loss of a leg, alleged to have been caused through the negligence of the defendant. The case was tried to a jury. At the close of the plaintiff's evidence the defendant's counsel moved for a directed verdict upon the ground of the insufficiency of the evidence, and at the close of all the evidence a similar motion was made. These

¹Reported in 95 Pac. 84.

motions were denied, and the case was submitted to the jury. The evidence shows that the plaintiff was directed to assist in raising a gate in order to let a large body of water escape from a flume; that while he was so engaged at the lower outside part of the gate, and in a dangerous position, the appellant's foreman, who knew of his position and without notice to the respondent, suddenly raised or caused the gate to be raised from the inside, thereby precipitating a large body of water onto the respondent and causing his injury.

The main question of fact in the case was whether the respondent knew, or ought to have known, that an effort was being made to raise the gate from the opposite side. A careful reading of the evidence convinces us that this was a question for the jury. It is not claimed that the jury was not properly instructed upon this question, but it is urged that the question was one for the court. The plaintiff's testimony clearly made out a case. There were some minor facts, such as that the end of a board projected through under the gate, which board might have been seen by the respondent, and which would have indicated to him that others were attempting to raise the gate; but when we consider his position, the rush and roar of the water, and all his surroundings, such facts are not sufficient to overcome his positive statements. We think the court properly denied both motions.

In the course of respondent's cross-examination he was asked this question: "Mr. Harris, will you state positively that Mr. Bush did not have time to walk back to the pressure box and get half way back with the peavey between the time the plank was put through and the happening of the accident?" An objection was sustained to this question. Both before and after this question was put to the witness, he testified that he could not fix any length of time between these events. "It happened quicker than I can tell you;" "instantaneous," and like expressions were used. While the exact question was not answered by the witness, it was answered many times in substance, and the error, if any, was thereby cured.

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Syllabus.

Appellant also requested an instruction to the effect that, if in doing his work two methods of procedure were open to respondent, one of which was safe and the other unsafe, and he voluntarily adopted the unsafe method, he could not recover. This instruction was refused, and appellant argues that this ruling was error. The rule is correctly stated and should be given in cases to which it applies, but it applies only to cases where there are obviously two ways of doing a certain act, one way safe and the other way obviously dangerous, and the servant voluntarily elects the dangerous way. *Ramm v. Hewitt-Lea Lumber Co.*, *ante* p. 263, 94 Pac. 1081. We find nothing in the record in this case to bring the respondent within the rule requested. The instruction, therefore, would tend to confuse rather than enlighten the jury, and it was not error to refuse the instruction.

We find no error in the record. The judgment must therefore be affirmed.

HADLEY, C. J., ROOT, CROW, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 7166. Decided April 24, 1908.]

J. A. JAMES, *Appellant*, v. THE CITY OF SEATTLE *et al.*,
*Respondents.*¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT FOR BENEFITS—LIMITATION—PETITION BY OWNERS. Under Laws 1903, p. 121, restricting the city council, in levying assessments for local improvements, to fifty per cent of the assessed value of the property benefited, except where a petition by three-fourths of the owners specifies "not to exceed a certain higher percentage," the term "percentage" is not to be given a technical meaning restricting the assessment to a fractional part of the assessed value; but an assessment may be made for two hundred per cent of the value, when petitioned for, if within the constitutional limit of the value of actual benefits conferred.

¹Reported in 95 Pac. 273.

SAME—PROCEEDINGS—MODE OF VALUATION—GENERAL ASSESSMENT AS BASIS. Upon a petition for an improvement limiting the levy for benefits to two hundred per cent of the “assessed value,” without specifying that reference was made to the last valuation for general taxation, it is proper to base the levy for benefits upon an assessment made after the petition was filed and before the ordinance was passed, if passed within a reasonable time.

SAME—PROCEEDINGS—PETITION OF OWNERS—CONDITIONS—EFFECT—JURISDICTION. A condition, expressed in a petition for a local improvement, calling for certain things and providing a lien therefor “so far as the same may be legally made a lien” is not a jurisdictional one, rendering the proceeding nugatory; since if it could not be legally done it was nevertheless the intention of the petitioners that the improvements be made.

SAME—CONTRACTS—VALIDITY—BIDS—CONDITIONS—EFFECT. Conditions named in proposals for bids upon a contract for a municipal contract, requiring the contractor to excavate for private property owners and to contract with them, do not render the proceeding void unless it can be said as a matter of law that the conditions necessarily increase the cost of the improvement.

SAME. Where the regrade of streets calls for a cut of fifty feet, requiring abutting property to be sloped back, and, to be available, to be graded to street level, a condition requiring the contractor to contract with owners to excavate private property at the same price as bid for the street work does not necessarily increase the cost of the improvement to taxpayers, where it is not alleged to do so, as a matter of fact, and therefore does not render the contract void as a matter of law.

SAME—PROCEEDINGS—MODE OF VALUATION—BASIS. The previous assessment for general taxation controls the jurisdiction of the city to order an improvement, regardless of the fact that part of the property assessed is to be taken for widening the street; since such portion must be paid for when taken.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 7, 1907, upon sustaining a demurrer to the complaint, dismissing an action to restrain the performance of a contract for local improvements. Affirmed.

L. T. Turner, for appellant.

Scott Calhoun and Peters & Powell, for respondents.

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Opinion Per MOUNT, J.

MOUNT, J.—This action was brought by the appellant to restrain the respondents from carrying out a contract for excavating certain streets. The contract was let by the city of Seattle to its co-respondent, the Rainier Development Company. The defendants filed a general demurrer to the complaint. This demurrer was sustained by the court below. The plaintiff elected to stand upon the allegations of the complaint. The action was thereupon dismissed. He appeals.

The complaint shows, that the authority of the city council to order the improvement rests upon a certain petition signed by the owners of three-fourths of the property within the whole improvement district, under chapter 82 of the Laws of 1903, page 121; that the appellant is the owner of the real property abutting upon one of the streets to be improved; that he did not sign the petition therefor; that by the petition the owners of three-fourths of the property within the proposed district have attempted to confer upon the city council power to widen, alter, and change grades of certain named streets and to excavate such streets to the new grades, and to do other work incidental to such regrading and to assess the cost of these improvements against the property benefited thereby, provided the cost of such regrading and improvements incident thereto "shall not exceed two hundred per cent of the value of the real estate exclusive of improvements thereon within the district to be improved." The petition also states:

"Your petitioners do further respectfully represent that they sign this petition upon the following understanding, and do hereby agree to the following terms and conditions: . . . (2) The contract for the grading and regrading of the streets and avenues embraced in the above named district shall be let as a single contract; provided, that for the purpose of prosecuting such work said contract shall provide that said district shall be subdivided into three sub-districts, the boundaries of which shall be as follows: [Then follows the description of each sub-district.] The cost of grading and regrading the streets and avenues lying within the boundaries of each sub-district as hereinbefore described together

with the cost of all other work necessary or incidental to said grading and regrading shall be borne entirely by property lying within the limits of said sub-district respectively, so far as the same may be legally made a lien upon said property."

In this connection it should be stated that the complaint shows that, while the owners of three-fourths of the property within the district as a whole signed the petition, the owners of three-fourths of the property within the subdistrict in which the plaintiff's property is situated did not sign the petition. The petition contains the further condition that the city of Seattle, in entering into the contract for the performance of the work, shall insert therein a provision for and on behalf of and for the benefit of private property owners within the district to be assessed for this improvement who may desire said property to be excavated; that said owner shall have the right and privilege to demand that the contractor shall excavate said private property at the same time the abutting streets are excavated, and at a cost per cubic yard not to exceed the price bid by said contractor for excavating the streets and avenues, and that said contractor shall be required to enter into a contract with such private owners for the performance of such excavating "in accordance with the terms and conditions herein provided." It is further provided in the petition that all the signers of such petition will enter into such contracts with the contractor, "provided that said contractor shall accept in full satisfaction for private excavation a lien against said private property, payable at the option of the owners thereof, in cash upon monthly estimates made in general conformity with the monthly estimates made for the streets abutting said property. The said owner may elect to pay for such private excavation at the expiration of any period not exceeding ten years after the completion and acceptance of said work by the board of public works, with interest on deferred payments at the rate of seven per cent per annum, payable semi-annually."

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This petition was filed with the board of public works of the city on May 12, 1906. Thereafter, on December 3, 1906, the city council, by unanimous vote, passed an Ordinance No. 14,993, as follows, omitting the formal parts:

“Section 1. That Third avenue and Third avenue produced, from Pine street to Cedar street; Fourth avenue, from Pine street to Cedar street; Fifth avenue, from Westlake avenue to Denny way; Olive street, from Stewart street to Westlake avenue; Stewart street, from Second avenue to Westlake avenue; Virginia street, from Second avenue to Westlake avenue; Lenora street, from Second avenue to Fifth avenue; Blanchard street, from Second avenue to Fifth avenue; Bell street, from Second avenue to Fifth avenue; Battery street, from the alley between Second avenue and Third avenue to Fifth avenue; Wall street, from the alley between Second avenue and Third avenue to Fifth avenue; and Vine street, from the alley between Second avenue and Third avenue to Fifth avenue; and the approaches to such streets and avenues for such distance back therefrom, not exceeding two hundred fifty-six (256) feet, as may be necessary to make proper and suitable approaches thereto, be improved by grading and regrading the same and by the construction of such temporary sewers and the alteration, removal, and reconstruction of the existing sewer system, as may be rendered necessary by the grading and regrading of said streets, avenues, and approaches, said improvement to be made in accordance with the stipulations and agreements contained in the property owners’ petition therefor, being file No. 30060 of the records of the city of Seattle in the office of the comptroller of said city. Said improvement to be made according to the plans and specifications prepared under the direction of the city engineer and on file in the office of the department of public works. And that assessments be levied and collected upon all lots and parcels of land specially benefited by said improvement to defray the cost and expense thereof and local improvement district bonds be issued as hereinafter provided, and said assessment shall become a first lien upon all property liable therefor and for the payment of said local improvement district bonds as hereinafter provided.

“Section 2. That there is hereby established a local improvement district to be designated as “Local Improvement

District No. 1345," which district is described as follows: All the property abutting, adjacent and approximate to said portion of said streets and avenues named and described in section 1 herein to such distance back from the marginal lines thereof as prescribed by the city charter, the property included within said local improvement district shall be deemed to be and shall be the property specially benefited by said improvement and the total cost and expense of the improvement herein ordered, including all necessary incidental expenses, shall be defrayed by collection of special assessments upon the property included in said local improvement district, which said assessment shall be made upon said property in all respects as provided by the laws of the state of Washington and the city charter and ordinances of the city of Seattle, and, together with interest to accrue upon the respective sums so assessed shall be collected as herein provided.

"Section 3. That the mode of making payment for the said local improvement shall be the mode of 'payment by bonds,' as provided by an act of the legislature of the state of Washington entitled 'An act authorizing the issuance and sale of bonds by cities to pay for local improvement providing for the payment thereof and declaring an emergency,' approved March 14, 1899, and under the provisions of ordinance No. 5693, of said city, approved December 6, 1899. The provisions of this section shall apply only to the mode of payment of said assessment and shall not be construed as limiting the method of assessment to the plan provided by the charter of the city of Seattle or said ordinance 5693.

"Section 4. That said improvement shall be made under the supervision of the board of public works, which board is hereby ordered to proceed with said improvement as soon as the bonds of said local improvement district shall have been issued and the improvement shall not be begun until said bonds are negotiated and sold unless the said contract for said improvement shall provide for the delivery of said bonds to the contractor in payment therefor: *Provided*, If the contract for said improvement shall be so made that the contractor constructing the same shall accept the bonds in payment thereof, the improvement may be commenced immediately after the execution of the contract: *Provided*, That if the contract for said improvement does not provide for the delivery of bonds to the contractor, said bonds shall be negotiated before said improvement shall be commenced and if

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the bonds be not negotiated and the contract for said improvement shall provide that said bonds shall be delivered to the contractor in payment for such improvement, the board of public works shall provide for the delivery of any of said bonds during the progress of the work, as in its judgment it may deem safe and proper.

"Section 5. That provision shall be made by ordinance for the issuance of bonds of said local improvement district for the whole estimated cost of said improvement less the amount issued against lands of the United States, the city of Seattle, and less the amount paid upon the assessment prior to the time for the issuance of the bonds, and for their delivery to the contractor constructing the improvement in payment thereof or their negotiation and sale. Said bonds shall be payable in ten equal annual installments and shall bear interest at the rate of six per cent per annum payable annually upon all unpaid installments of said bonds.

"Section 6. This ordinance shall take effect and be in force from and after its passage and approval if approved by the mayor, otherwise it shall take effect at the time it shall become a law under the provisions of the city charter."

Seattle Ordinance, No. 14,933.

Thereafter, pursuant to said ordinance, the board of public works called for bids and let a contract to the respondent Rainier Development Company, for said work, which said call for bids and the contract referred to the plans and specifications then on file in the office of said board, which plans and specifications contained the following stipulations and provisions:

"The said contractor agrees to all the stipulations and agreement as set forth in the property owners' majority petition now on file in the office of the city comptroller, said petition, stipulation and agreement being part of this contract so far as the same is in conformity with the laws of the state of Washington, the charter of the city of Seattle and the ordinances of said city. Said stipulations and agreements are as follows."

Then follows the conditions of the petition set out above. The complaint then alleges that the cost of the work provided for by the said contract and the amount required by

the said contract to be paid by the contractor therefor, is more than two hundred per cent of the authorized valuation of the lands (including the strips to be taken by the widening of the streets) in the assessment district, according to the assessed valuation thereof on the last annual assessment roll prior to the filing of said petition, but less than two hundred per cent and more than fifty per cent of the total assessed valuation of said property for general taxes, as the same appears upon the last assessment roll made for the levying of taxes prior to the passage of said ordinance.

The appellant contends that the contract is illegal because the statute does not confer upon the owners of three-fourths of the property in a proposed assessment district the right to fix a limit of assessment in excess of the value of the property. The statute referred to is as follows:

“It shall be lawful for any city of the first class to order any improvement, the cost of which is to be charged to abutting property, when said cost shall not exceed fifty per cent of the valuation of the real estate exclusive of improvements within the proposed improvement district according to the valuation last placed upon it for purposes of general taxation, when such improvement is ordered by a unanimous vote of the council of said city of the first class: *Provided*, That this limit may be exceeded when any improvement shall be petitioned for by the owners of three-fourths of the property to be assessed for said proposed improvement, and when such petition specifies not to exceed a certain higher percentage.”
Laws 1903, p. 121.

It is argued that the use of the word “percentage” denotes a fractional part, and therefore the legislature intended by the use of the word percentage to limit the petitioners to less than the whole value of the real estate. It seems clear by the context that the legislature intended to, and did, limit the council to improvements costing fifty per cent of the assessed value of the real estate to be improved when the improvement was ordered without a petition of the property owners, but expressly provided “that this limit may be exceeded when any

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improvement shall be petitioned for by the owners of three-fourths of the property to be assessed." This clearly indicates that no limit was intended to be fixed by law in such cases. But the last clause leaves the limit to be fixed by the petitioners themselves so that, whatever may be the technical meaning of the word percentage, it is clear from the whole context of the section quoted that no technical meaning was to be given to the word percentage, and that no limit was fixed except in the case first named. Appellant states "if the statute means that the city council may, upon petition of the owners of three-fourths of the property, fix any limit, no matter how high, then the statute is unconstitutional as depriving a citizen of his property without due process of law." No authorities are cited to support this statement, and no further argument made thereon. The limit of the council above fifty per cent is fixed by the petition of the property owners, and the constitutional limit is the value of actual benefits conferred. 1 Cooley, *Taxation* (2d ed.), p. 623 *et seq.*; Abbott, *Municipal Corporations*, § 337 *et seq.*; Hamilton, *Special Assessments*, § 202 *et seq.*; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791.

It is next argued that it was the intention of the petitioners to limit the assessment with reference to the last valuation placed upon the property for general taxation, which preceded the filing of the petition. The petition does not so recite, and the complaint shows that the ordinance was based upon the valuation last placed upon the property before the ordinance was passed. This valuation was fixed between the dates of filing the petition and the passage of the ordinance. We think this last valuation controls, particularly where the ordinance was passed within a reasonable time after the petition was filed.

It is next argued that the petition furnishes no jurisdictional basis for the improvement, because the conditions expressed in the petition render it nugatory. It is true the petition recites, that the petitioners "sign this petition upon

the following understanding and do hereby agree to the following terms and conditions." By condition second the petitioners require the contract for the entire district to be let as a single contract, "Provided, that for the purpose of prosecuting such work said contract shall provide that said district shall be subdivided into three subdistricts." The boundaries of each is then specially described, and it is further provided that "the cost of grading and regrading the streets and avenues lying within the boundary lines of each subdistrict as hereinbefore described, together with the cost of all work necessary or incidental to such grading and regrading, shall be borne entirely by the property lying within the limits of said subdistrict respectively, so far as the same may be legally made a lien upon the property." The whole provision specifies that the work of regrading all the streets shall be let as a single contract, and that for the purpose of prosecuting the work the contract shall provide that the district shall be divided into three subdistricts, and that "the cost of grading . . . within . . . each subdistrict shall be borne entirely by the property lying within the limits of said subdistricts respectively, so far as the same may legally be made a lien upon said property." If this could not legally be done, it was nevertheless the intention of the petitioners that the improvement should be made. The condition therefore was not a jurisdictional one. The third condition in the petition was to the effect that the city, on entering into the contract for the performance of the work, should insert a provision for and on behalf of and for the use and benefit of the property owners within the district, binding the contractor to excavate the private property of the petitioners to the new grade at the same cost per cubic yard as the price fixed for excavating the streets. The fourth condition was to the effect that the property owners might pay the contractor for private excavation in cash or in ten years after the completion of the work, the contractor reserving a lien on such private property. The city incorporated these two last named conditions in the

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call for bids, and the contract was let accordingly. It is contended that the city was without authority to contract for private parties, and these provisions in the call for bids are to the manifest injury of the appellant. Unless it can be said, as a matter of law, that these conditions necessarily increased the cost of the improvement to the property owners, they do not render the contract void. *Hamilton on Law of Special Assessments* says, at § 452:

"As the very purpose of inviting proposals for public work is to give the property owner the benefit of the lowest price he may obtain by a free and unrestricted bidding it follows that conditions in the specifications or contract which restrict bidding or tend to increase the cost of the work will vitiate the entire proceedings. Where contracts for local improvements are required by law to be awarded to the responsible bidders offering to do the work for the lowest sum, any provision in the specifications tending to increase the cost and make the bids less favorable to the property owners is illegal and void. Such provisions are commonly restrictive of the hours of daily labor that men employed by the contractor may work, or forbidding the employment of Chinese or alien labor, or fixing the minimum rate of wages. Whatever form the restriction assumes will be disregarded by the courts, if the conditions increase the cost of the work to the taxpayers," etc.

We think it cannot be said, either as a matter of law or fact, that those conditions of the bid or contract in this case tended to increase the cost of the work to the taxpayer. It is common knowledge that large bodies of earth can be moved more cheaply per cubic yard than small bodies. It is conceded that some of the cuts for streets in this case are fifty feet deep, and that the private adjoining property must be sloped back by the contractor one foot for each foot in depth, and that the private adjoining property to be available must be graded to the level of the street. We think the contractor for the grading of the streets could do the public work cheaper where he knew he could do all or even a portion of the private work of the same kind adjoining, than if the private work were omitted. If this is correct, it follows that the conditions

named in the contract do not necessarily increase the cost to the taxpayer, but are a material benefit which he may avail himself of if he so desires. This condition therefore did not render the contract void as a matter of law. It is not alleged that they do so as a matter of fact.

Appellant also argues that there has been no valuation placed upon the property for general taxation within the proposed assessment district, for the reason that a part thereof is proposed to be taken for widening the streets, and the balance as a body by itself has never been assessed for general taxation. There is no merit in this contention. The city cannot take any part of the property without compensation, and the balance is liable to assessment for its value. The increased width of the streets will presumably add some value to the remaining property, but, in any event, the last valuation for general taxation controls the jurisdiction of the city to order the improvements.

We are of the opinion that the trial court properly sustained the demurrer, and the judgment is therefore affirmed.

HADLEY, C. J., CROW, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

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Opinion Per Curiam.

[No. 7148. Decided April 24, 1908.]

GERMAN-AMERICAN STATE BANK, Respondent, v. SPOKANE-COLUMBIA RIVER RAILROAD AND NAVIGATION COMPANY, Appellant.¹

PLEDGES—WRONGFUL ENFORCEMENT—SALE IN BAD FAITH. Where the payee of a note of a corporation, holding collateral under a power to sell at private sale without notice, refused to consider an offer of \$5,000 for the collateral, made by stockholders of the corporation, and subsequently sold the collateral privately for \$2,500, the payee is guilty of bad faith and is liable to the corporation for the actual value of the collateral, since it was bound to realize as near the value as possible.

EVIDENCE—COMPETENCY—VALUE OF PROPERTY. A rejected offer of a price for property, made in good faith, is competent evidence of its value, as against the owner denying such value.

PLEDGES—WRONGFUL ENFORCEMENT—EVIDENCE OF VALUE. Where the holder of collateral refused an offer of \$5,000 therefor, and then sold the same privately for \$2,500, and there was no other evidence of the value of the collateral, the same should be found to be \$5,000.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 8, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Reversed.

B. C. Mosby, for appellant.

Merritt, Oswald & Merritt, for respondent.

PER CURIAM.—This is an action to recover a balance alleged to be due and owing upon a promissory note. The complaint alleges that the defendant, on or about the 13th day of December, 1905, executed its note to the plaintiff for the sum of \$5,000, payable ninety days after date, with interest thereon at the rate of twelve per cent per annum from date until paid. After allowing certain credits, judgment is

¹Reported in 95 Pac. 261.

asked for \$2,420, with interest, and also for \$500 as attorney's fees. The answer shows that, on the 19th day of May, 1906, B. C. Mosby was appointed receiver for the defendant corporation, and that, having duly qualified as such, he answered as receiver in behalf of the defendant. It is denied that any sum is due and owing upon the note, and it is affirmatively alleged that, after the execution of the note, the plaintiff and the defendant entered into a written agreement concerning the note in suit, by the terms of which certain promissory notes—sixty-one in number—the property of the defendant, and of the aggregate face value of approximately \$15,000, were assigned and delivered to the plaintiff as collateral security for the payment of the defendant's aforesaid note; that afterwards the plaintiff wrongfully converted about three-fourths of the collateral notes to its own use through a fraudulent sale thereof; that the sale was made for \$2,500, which was about one-fourth of the actual value of the notes. It is alleged that the defendant is entitled to recover against the plaintiff the sum of \$4,083, and judgment is asked for that amount. The plaintiff replied that the agreement concerning the collateral notes provided that the plaintiff might sell and dispose of them without demand, notice to redeem, or notice of the time, place, or manner of sale, and at public or private sale; that in accordance therewith, the plaintiff sold the notes, except such as had been theretofore paid, for \$2,500, which sum was applied upon the defendant's note. Upon the above issues, the cause was tried before the court, without a jury, and a judgment was rendered for the plaintiff in the sum of \$1,904.90 and costs, from which the defendant has appealed.

The evidence shows that two holders of stock in the appellant company went to the respondent and offered to pay the latter \$5,000 for the transfer of the collateral notes. The respondent refused to do this and soon afterwards sold the notes at private sale without notice, for \$2,500. No actual tender of the \$5,000 was made by the exhibition of the coin,

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but the circumstances showed that a tender was not necessary, since the respondent refused to consider the offer and so flatly stated at the time. Respondent argues that the offer was not made in behalf of the appellant, but that it was merely in behalf of the persons asking it for their own speculative purposes, and that respondent was under no obligations to assist them in a speculative scheme. Whatever may have been the motive of the persons who made the offer, it is nevertheless true that, if the offer had been accepted and the transfer consummated, the appellant would have benefited by it to the extent of \$2,500. To that extent at least the offer was in effect in the interest and behalf of appellant. Respondent held the collateral notes in trust for appellant for a specified purpose, and was under both the moral and legal obligation to realize for them a sum as near their actual value as could be reasonably obtained. Having refused an offer of \$5,000, respondent afterwards deliberately sold the notes privately for \$2,500. It is true the agreement was that the notes could be sold privately, but the law implies that, under all such agreements, at least ordinary good faith shall be exercised. We think the circumstances stated do not show good faith, and that the respondent must be held liable for the actual value of the collateral notes.

What was the real value as shown by this record? The offer of a price for property made in good faith and rejected by the owner is competent as evidence of value. 16 Cyc. 1136, 1141, 1143. The offer of \$5,000 in this case was therefore competent evidence of value. Respondent produced no evidence upon the question of value, except that it was offered and had accepted \$2,500. That, however, did not overcome the force of the other evidence, that it had been offered and had rejected \$5,000. With the evidence standing thus, we think the value must be found to have been \$5,000. Respondent in its complaint, along with other credits, allowed a credit of \$2,500 upon appellant's note, as the proceeds of the sale of the unpaid collateral notes. There remains therefore \$2,-

500 more to be placed to appellant's credit. After deducting from the \$2,500, the amount the court found to be the balance upon appellant's note, judgment should go against respondent and in favor of appellant for the remainder.

The judgment is reversed, and the cause remanded with instructions to enter judgment in accordance with this opinion.

[No. 6947. Decided April 25, 1908.]

THOMAS A. RUSSELL, Respondent, v. B. SCHADE BREWING COMPANY, Appellant.¹

WITNESSES—CROSS-EXAMINATION. It is proper to exclude cross-examination of a party as to what he would have done under supposed circumstances which did not exist.

TRIAL—DECISION—REVIEW—FINDINGS. In view of Bal. Code, § 5029, requiring the court on trial of issues of fact to give its decision in writing, the oral opinion of the court, delivered at the conclusion of the testimony, that judgment should go for the defendant, does not preclude the court from afterward deciding to enter written findings and a judgment in favor of the plaintiff; as until the decision is made in writing it is under the control of the court.

EVIDENCE—ADMISSIONS—ENTRY IN ACCOUNT BOOK. In an action for services as a physician, rendered to defendant's employee under a specific contract of employment made by the defendant, an entry in the physician's account books against the employee "care of the defendant" is not a conclusive admission that the services were originally rendered to the employee only, the physician testifying that the entry was simply for the purpose of identifying the account.

CORPORATIONS—REPRESENTATIONS—OFFICERS—AUTHORITY—CONTRACTS—EVIDENCE—SUFFICIENCY. There is sufficient *prima facie* evidence that the president of a brewing company assumed to have general management and was so held out by the corporation, thereby authorizing him to employ a physician to attend an injured employee, where it appears that he was present at the time of the accident, took charge and gave directions as to securing a physician, ambulance, and nurse, as one apparently in charge, and afterwards talked as one having general powers, and had notice that the services were being rendered in reliance upon his authority to make the employment.

¹Reported in 95 Pac. 327.

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Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 15, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contract of employment. Affirmed.

H. M. Stephens, for appellant.

James Dawson and F. E. Langford, for respondent.

HADLEY, C. J.—This is an action to recover for services of plaintiff as a physician and surgeon. Suit was brought against B. Schade and B. Schade Brewing Company, a corporation, as defendants. The complaint alleges that, on or about the 8th day of December, 1905, one Blickensdorfer was in the employ of the defendants, and that while engaged in the work of his employment he fell from a ladder or scaffold and was severely injured; that about that date the defendant B. Schade, acting in his own behalf and in behalf of B. Schade Brewing Company, employed the plaintiff in his capacity as physician to take charge of Blickensdorfer and to care for his injuries; that pursuant to said employment he took charge of the patient and furnished the usual medical care and attendance necessary in such cases, and continued so to do until about June 13, 1906, the value of the services being placed at \$1,186. It is alleged that the defendant Schade was the president of the defendant corporation and appeared to be in the management and charge of its plant and affairs. The defendants by their answer admit the injuries to the employee, but deny that they employed the plaintiff to treat him. The cause was tried by the court without a jury, and resulted in a judgment for the plaintiff against the brewing company for \$1,186. Judgment against Schade was denied. The corporation has appealed.

The first suggestion of error is that the court refused to permit cross-examination of the respondent with reference to what he would have done if Schade had not made the alleged

promise to pay him for the services. Cross-examination for the purpose of ascertaining all the facts and circumstances that actually existed was proper; but it was wholly immaterial what respondent might or would have done under merely supposed circumstances which he asserted did not exist, and it was not error to exclude cross-examination on such a purely speculative subject.

It is next urged that the court reviewed and reversed its own decision after it had been rendered, and that it was error to do so. At the conclusion of the introduction of testimony the court delivered an oral opinion which was to the effect that judgment should go for the appellant. The court orally stated its reasons in the mere form of an opinion, but no actual decision was given in writing as required by Bal. Code, § 5029 (P. C. § 645), when a cause triable by jury is tried by the court without a jury. The section is as follows:

"Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly."

The next section, 5030, provides that the findings of the court upon the facts shall be deemed the verdict. It is manifest, therefore, that there is no verdict upon which judgment can be rendered until the findings have been given in writing and filed with the clerk. Following the announcement of the court's oral opinion, the respondent moved for judgment notwithstanding the same, and the written findings and conclusions afterwards entered constituted a verdict in favor of respondent, upon which judgment was accordingly entered. That written findings are necessary under the above statute in actions at law tried by the court without a jury, was early held by this court, although they may not be required in equitable actions. *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273; *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030. At no

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time did the court make a decision in writing favorable to appellant, and we think, particularly in view of our statute, that a distinction must be made between a mere opinion of a trial court and its decision. In *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, Mr. Justice Field made the following observations:

"The terms 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them, and in ignorance of this or by overlooking it, what has been a mere revision of an opinion, has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment, the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing, or a modification. The latter is the property of the judges, subject to their revision, correction, and modification, in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records."

Somewhat similar observations were made in *Thomas v. Tanner*, 14 How. Pr. 426, as follows:

"Some misapprehension seems to have resulted from the use of the term 'decision' in the 267th section of the Code. I have recently seen a case where my own opinion in an action tried without a jury had been carried *bodily* into the judgment-record, and made the basis of a judgment which the attorney had conceived himself entitled to, as the result of the views expressed in that opinion. But the decision, which, by the 267th section of the Code, is required to be 'given in writing and filed with the clerk,' is a very different thing from the opinion which the judge may think it proper to write. The opinion may, and often does, serve to enable the attorney to prepare the 'decision' for the judge to sign. This is the primary office of the opinion. But whether there be an opinion or not, there must, in every case of a trial by the court, be a *decision*. That decision must be made by the judge. This can only appear by his signature or *allocatur*."

It follows that when an action at law is tried by the court without a jury, the mere announcement of an oral opinion is not the decision within the meaning of our statute, since the

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"decision," as it is named in the statute, "shall be given in writing and filed with the clerk." Until that has been done the decision that shall be rendered is still within the mind of the court and under its control. In the case at bar the court did not review any actual decision, and but one was rendered within the meaning of our statute.

It is argued that the court erred in not giving proper consideration to what is alleged to have been the admission of respondent. This contention is based upon the following entry in respondent's books of account: "Account of John Blickensdorfer, residence care of the Schade Brewing Company." It is insisted that the above entry is an admission that the charge was not at the time made against the appellant, but against the injured man. Respondent testified that it was not so intended, but that the entry was simply his method of identifying the account as that of appellant for services rendered Blickensdorfer. The account book was one with certain printed headings, and blanks left for entries. The word "residence" was printed and was not erased. The actual entry, respondent testified, was made without any reference to the matter of residence. The oral evidence was explicit as to the employment and it is not to be excluded from consideration by the introduction of a mere loose memorandum not intended to be a permanent memorial of the agreement, to which class of writings entries made in books of account belong. 21 Am. & Eng. Ency. Law (2d ed.), 1086, 1087.

It is assigned that the court erred in not giving judgment for the appellant. We think without doubt that there is sufficient evidence to show that Schade intended, in behalf of the corporation, to employ the respondent, and that he intended that respondent should so understand it. The remaining question in this connection is whether he had the authority to bind the corporation. It is admitted in the pleadings that Schade was at the time the president of the corporation. Under many authorities the mere fact that he was the president did not of itself empower him to make the contract. The

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rule followed in Illinois, as stated by the supreme court of that state in *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154, is to the effect that, as a general rule, a corporation acts through its president, and through him executes its contracts, and that an act pertaining to the business of the corporation not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporate body. The court recognized that an exception to the general rule may be created by the provisions of the by-laws of a corporation limiting the powers of the president, but held that, in the absence of proof that such by-laws existed, the presumption of authority prevailed. If the above rule should be applied here, then Schade, being the president and head of the corporation, would be presumed to have been authorized, since there is no proof to the contrary. There is no proof that the by-laws of the corporation, or any other act of the corporate body, had placed any limitations upon his power in the premises.

The Illinois rule is, however, criticized by appellant as not being in harmony with the weight of authority. It is true the authorities generally do not permit the presumption of authority to arise from the mere fact that one is president, but it has often been held that, from such fact coupled with a course of conduct in the way of active participation in the management of the corporation's affairs, authority will be implied, in the absence of proof that it has been expressly withheld. *White v. Elgin Creamery Co.*, 108 Iowa 522, 79 N. W. 283; *Meating v. Tigerton Lumber Co.*, 113 Wis. 379, 89 N. W. 152; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; *Towers v. Stevens Cattle Co.*, 88 Minn. 243, 86 N. W. 88; 10 Cyc. 903, and authorities cited. This court has already expressly held that, when a corporation allows certain officers to participate in the management of its business, such as president, vice president, and superintendent, it must be responsible for their acts unless it

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affirmatively shows they were unauthorized. *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247; *Carrigan v. Port Crescent Imp. Co.*, 6 Wash. 590, 34 Pac. 148. It is true the testimony in the case at bar did not comprehensively cover the subject of the conduct of Schade in his relations with the corporation in general. It did show, however, that at the time respondent was injured Schade was at the brewery; that he immediately assumed to give directions as one apparently in charge, and that employees present appeared to expect him to do so. His consent to the calling of respondent was sought and obtained. He first suggested the calling of another. Respondent was called under his directions, and when he arrived at the brewery he mentioned to Schade the necessity of taking the patient to the hospital at once. Schade thereupon gave directions to the employees of the company to order an ambulance for that purpose, which was done. He afterwards talked with respondent, also with the injured man, and with a nurse who served the latter, as one having general powers of management. The confinement of the injured employee covered a period of several months, during which time respondent performed two amputations upon one of the patient's legs, and otherwise treated him almost from day to day. These facts were well known to Schade, and he was bound to know that the services were being rendered in reliance upon his authority to make the employment. Having this knowledge as the president and head of the corporation, it should not be said that the corporation itself was under such circumstances wholly without knowledge of the situation. Schade was not only known to the respondent as the president of the corporation, but there was sufficient evidence to make a *prima facie* showing that he assumed to direct its affairs, and that he was permitted by the corporation to hold himself out and to act as one exercising apparent general authority. After such a *prima facie* showing, it devolved upon the corporation to show that Schade did not have the authority if such was the fact. This was not done,

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and we think, in view of all the evidence, the court did not err in entering judgment against the corporation. In so holding we do not wish to be understood as at this time giving our full allegiance to the Illinois doctrine as heretofore stated, that the presumption of authority arises from the mere fact that the employment is made by the president of a corporation. As we have seen, the facts of this case are such as place it in another and larger class of cases which require some appearance of active direction of corporate affairs in order to raise the implication of authority.

Having discussed all the subjects assigned in the briefs, and finding no reversible error, the judgment is affirmed.

MOUNT, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 7002. Decided April 25, 1908.]

THEODORE O. LOVELAND *et al.*, Appellants, v. JENKINS-BOYS COMPANY, Respondent.¹

PLEADING—ANSWER—INCONSISTENT DEFENSES. A denial of the execution of a contract, and an affirmative defense setting up that any signature of the defendant secured by plaintiff to any contract was obtained by trickery and fraud, which was set forth, are not inconsistent defenses.

CONTRACTS—VALIDITY—EXECUTION—FRAUD—ESTOPPEL—LACHES. Negligence and laches in signing his name to a contract does not estop a party from asserting its invalidity by reason of trickery and fraud in securing his signature without his intent to sign a contract or knowledge that he was doing so.

SALES—AVOIDING CONTRACT—RETURN OF GOODS—LIEN FOR ADVANCES. A consignee who receives and advances the freight on a shipment of goods, which he was not under contract to take, as appears after opening the package, is not under obligation to return them, but may give notice and hold them until repayment of the advance.

¹Reported in 95 Pac. 490.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered June 9, 1907, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

Bugge & Swartz, for appellants.

Rose & Craven, for respondent.

FULLERTON, J.—This action was brought by the appellants against the respondent to recover upon a written contract for the sale of jewelry. The contract in question was in the form of an order directing the appellants to ship to the respondent the jewelry described on a certain list to which the order was attached, on the terms printed thereon. The complaint set forth the contract, alleged its execution by the respondent and delivery to the appellants, the shipment of the goods ordered, their receipt by the respondent, and the failure and refusal of the respondent to pay for the same. For answer the respondent denied executing the written contract set out, or giving any written order for the goods described therein on the terms set out in the contract; and for a further and separate answer, alleged in substance that it entered into an oral contract with the appellants to sell certain of its goods on commission, the kind and character of which were particularly described; that the appellants shipped it the goods described in the complaint; that, upon the receipt of the goods, it paid freight and drayage charges for their transportation from their place of shipment to the respondent's place of business, amounting to \$6.85, the payment being necessary in order to obtain the goods from the carrier; that it thereupon proceeded to unpack the goods, when it discovered that the goods were not of the character or kind the appellants had agreed to furnish, nor were they goods that the respondent could handle in connection with the business in which it was engaged; that it immediately repacked the goods and notified the appellants by letter that it would not receive the same, and would return

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them to the appellants on the repayment of the freight and drayage charges it had advanced. That the appellants replied to the letter, claiming that they had made a sale of the goods to the respondent and held a written order for the same. It further alleged that this was the first time it learned that the appellants claimed to have a written order for the goods, and averred that if the order bore the genuine signature of the respondent, such signature was obtained thereto by trickery and fraud, and without the knowledge of the respondent. It then set forth the manner in which the signature was obtained. This it did in the following language:

"[The appellant's agent] then asked H. C. Jenkins, an officer of the defendant, with whom the greater part of the above negotiations was had, to state the exact corporate name of defendant, so that the consignment arranged for might be correctly addressed, and with a pencil in hand made a movement indicating that he was about to write out the same. Defendant by its said officer informed him of the correct spelling of said name, and the said Wood replied that the word 'Boys' was spelled in a peculiar manner and asked the said officer of defendant to write it out for him himself, handing him the pencil, and indicating on what said official supposed was a piece of paper containing only the blanks for the name of customers and their address the place for him to write the same. That the said official of defendant for the sole purpose of getting the correct name of defendant, as requested, wrote out the same upon the paper thus indicated by said Wood, without the defendant having entered into any contract except as above indicated, and with no purpose or intention to sign any contract whatsoever. That if the document so alleged by plaintiffs to be a written contract bears the signature of defendant, such signature was obtained by trickery and fraud, and under the circumstances as here in this answer set forth, and not otherwise. That said alleged contract was never read to or by the defendant or any of its officers; that at the time defendant's officer wrote out the name of the defendant as aforesaid, the plaintiffs by their representative, with intention to trick and deceive the defendant, had a confusion of papers on the showcase over which the said officer of defendant was engaged, and that if plaintiffs' al-

leged contract bears the signature of defendant, the plaintiffs by their said representative covered and concealed the upper part of said paper in such confusion of papers which the said Wood had upon the showcase over which the defendant's said officer was working, and upon which the paper was lying upon which he wrote out the name of defendant as aforesaid, and that the purchase outright of the goods set forth in the complaint had not been discussed at any time during said negotiation, and that the defendant had consented to receive no goods whatsoever from the plaintiff except the showcase and certain goods upon consignment under the circumstances and in accordance with the arrangement above expressly set forth."

The appellants moved to strike the answer on the ground that it was inconsistent. This motion was denied, whereupon it demurred on the ground that the affirmative answer stated no defense. This demurrer was likewise overruled, whereupon it filed a reply, denying the affirmative matter in the answer, and alleging affirmatively that the respondent ought not to be heard as to its affirmative defense for the reason that it had not complied with the contract it admits it entered into. The affirmative matter was stricken on motion. The cause was then tried before the court and a jury, and resulted in a verdict and judgment for the respondent.

It is first assigned that the court erred in refusing to strike the answer on the ground of inconsistency. It is argued that the answer contains both a denial and an admission of the execution of the contract, and that such answers are not permitted under the code. But we think the appellants mistake the effect of the answer. There is no admission of the execution of the contract. The averment in the separate answer is that the signature of the respondent to the writing purporting to be a contract was obtained by trickery and fraud, and without any intent on its part to enter into a written contract. Pleadings are construed according to their legal effect, and it is not a legal execution of a contract to procure the maker's signature thereto by trickery and fraud, and when a person so defrauded is sued upon the purported contract, he may

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properly deny its execution and plead affirmatively the fraud practiced upon him by which he was induced to apparently execute it. The question what constitutes inconsistent defenses received a somewhat elaborate consideration by this court in the case of *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 48 Pac. 331, 48 L. R. A. 177. Reviewing a case from Ohio where the facts were similar to the facts in the case at bar, the court said:

"*Citizens' Bank v. Closson*, 29 Ohio St. 78, was an action by the bank against Closson upon a promissory note alleged to have been made by him to R. R. Fenner & Co. and indorsed to the bank before due. Closson set up the following defenses: (1) He denied the execution of the note; (2) he alleged that if the signature to the note was his, it was obtained by a fraudulent and cunningly devised scheme or trick without his knowledge, setting forth the fact that he was induced by false and fraudulent representations of Fenner & Co. to sign certain papers, represented to be mere receipts or orders relating to a proposed agency for selling a patent invention, and that if he signed the note his signature was procured by making him believe that he was signing one of the receipts or orders; that it was obtained without consideration and that the bank had knowledge of these facts when it purchased the note. The supreme court very properly held, and could not have held otherwise under any system of pleadings, that these defenses were all open to the defendant. They are not in any sense inconsistent, for even though the note was made as affirmed in the second defense, it would not be a legal execution of the note, and consequently does not contradict the first denial, viz., the denial of the execution of the note."

It is next urged that the court erred in overruling the demurrer to the separate defense. It is argued that, assuming the allegations of the answer to be true, it shows such a degree of negligence and laches on the part of the respondent in putting its name to the writing as to estop it from questioning its validity. But the appellants evidently overlook their own part in the transaction. The charge is that they obtained the signature by deceit and fraud. When this was proven the respondent's carelessness became immaterial. Where there is

an intent to execute a contract in writing, and one of the parties to it seeks to rescind it on the ground that he was not fully informed as to its contents, then the question of his negligence and laches in its execution becomes material. But the law of rescission has no application to a case where the signature of a party to a writing he had no intention of executing is obtained by trickery and fraud.

The affirmative matter in the reply was properly stricken. If the respondent did not perform the contract that was actually entered into, the remedy is a suit upon that particular contract; the respondent cannot be held upon a contract that it did not enter into merely because it failed to perform the contract it did make. The appellants seem to argue that the respondent is bound by the contract because it did not return the goods to the appellants. But it was under no obligation to do this. Had it appropriated them to its own use it could have been held to account for their reasonable worth, but it did its full duty to the appellants when it gave them notice that the goods were subject to their order on the payment of the charges advanced. The respondent was not, as the appellants argue, attempting to rescind a contract. There was no contract. The pleadings and proofs are to the effect that the writing called a contract was obtained from it by fraud. It therefore furnished no basis whatever from which to determine the appellants' rights. The respondent owed to them the duty concerning the goods that fair dealing between man and man required, and this was fully complied with when it repacked the goods and gave them a reasonable time to repay the charges it had been wrongfully induced to pay thereon and take the goods away.

The instructions requested were properly refused by the court as inapplicable to the issues. They were based on the assumption that a contract had been entered into, and that the respondent was seeking to set it aside. But, as we have said, this was not the issue before the jury. The issue was one of fraud in procuring the respondent's signature to a

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purported contract, and this was the question the jury were to determine. If they found it adverse to the respondent, the appellants were entitled to recover, as no other defense was interposed. The court fully and fairly charged the jury to this effect, and in doing so it performed its entire duty in that regard.

We find no error in the rulings of the court in admitting and rejecting evidence. There was substantial evidence also to sustain the verdict of the jury, and their finding is conclusive in this court as to the facts. The judgment should be affirmed, and it is so ordered.

HADLEY, C. J., CROW, ROOT, MOUNT, RUDKIN, and DUNBAR, JJ., concur.

[No. 7085. Decided April 25, 1908.]

**NORTH YAKIMA BREWING & MALTING COMPANY, Respondent,
v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.¹**

CARRIERS—DELIVERY—LIABILITY FOR GOODS DESTROYED—TERMINATION OF RELATIONS—EVIDENCE—SUFFICIENCY. A consignee had a reasonable opportunity to remove its goods, and the railroad company is, therefore, not liable as a common carrier for their loss, where it appears that the consignee in the forenoon called for beer containers, that had been received during the previous four days, and was told that the bills would be ready and it could have the goods at any time after noon of that day, that the consignee's place of business was only four hundred feet from the warehouse where the goods were stored, and it had its own drays, but did not call that afternoon, because not suiting its convenience to do so, and without fault of the carrier, the warehouse and goods were destroyed by fire that night.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered June 26, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover from a carrier for the loss of goods. Reversed.

¹Reported in 95 Pac. 486.

B. S. Grosscup and Ira P. Englehart, for appellant.
Snyder & Luse, for respondent.

FULLERTON, J.—The appellant is a common carrier operating lines of railway in this state and elsewhere, one branch of which passes the city of North Yakima. The respondent is engaged in the business of manufacturing and selling beer and other malt products at the city named, and in the course of its business ships large quantities of its products to different parts of the state, in containers of various kinds, the title to which it retains in itself. These containers, when emptied of their contents by the respondent's customers, are returned to it over the appellant's lines. Between the first and the morning of the fifth days of May, 1906, there were returned in this manner over the appellant's road containers of the aggregate value of \$394.80. On the morning of May 5th, the respondent's superintendent called at the appellant's freight office in North Yakima and asked for his expense bills, desiring to pay them and take away the several shipments that had there accumulated. The appellant's agent replied that he did not then have the bills ready, but that he would have them ready at any time after noon of that day. The respondent did not call for them in the afternoon, and they were destroyed the following night in a fire which burned the warehouse in which they were stored. The fire that burned the warehouse originated on the property of a third person, some distance from the appellant's warehouse, and spread thereto in spite of the efforts made to control it. The fire did not originate nor spread to its warehouse as the result of negligence on the part of the railroad company. The trial judge, trying the case without a jury, on the foregoing facts, held that the appellant's liability with reference to the goods was that of a common carrier; and, since the loss or destruction of the goods was not occasioned by the act of God nor the public enemy, it was liable to the respondent for their value. The correctness of this holding under the facts presents the only question we have found it necessary to consider.

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In the case of *Fisher v. Northern Pac. R. Co.*, *ante* p. 258, 94 Pac. 1073, we held that the mere placing of goods in storage by the carrier after they had arrived at their destination did not reduce the carriage liability to that of a warehouseman, but that its liability as carrier continued until such time as the consignee had a reasonable opportunity to inspect the goods and take them away in the usual course of business. The converse of the rule must be that after goods have been transported by the carrier to their place of destination, and a reasonable opportunity is given the consignee to inspect them and take them away, the carrier's liability thereafter is that of a warehouseman, and it can be held for the loss of the goods only when that loss is occasioned by some negligence on its part.

Was a reasonable time given in the present case to inspect and take the goods away? It seems to us that there was. What constitutes a reasonable time for the removal of goods after notice must, of course, vary with the circumstances of each particular case, and no general rule can be laid down applicable to all cases by which the fact can be determined, but, because of the nature of the liability and its extreme hazard to the carrier, it can be said that the consignee must act promptly after receiving notice of the arrival of his goods, and not defer taking them away to attend to other matters of his own no matter how important they may be. The liability of a common carrier for goods in transit is an extraordinary liability, and although founded on sound principles of public policy, is not to be extended beyond the point where necessity for its existence continues. In the case before us there was ample opportunity given to take the goods away. The respondent's place of business was but four hundred feet from the warehouse where the goods were stored. It had its own drays and trucks, and the only reason why the goods were not taken away during the afternoon preceding the night the fire occurred was that it did not suit the convenience of the respondent. This being true, we think it should bear the

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loss instead of the appellant, since each of the parties is equally free from responsibility for the fire which caused the loss.

The judgment appealed from will be reversed, and the cause remanded with instructions to enter a judgment to the effect that the respondent take nothing by its action, and that the appellant recover its costs.

HADLEY, C. J., RUDKIN, DUNBAR, CROW, and MOUNT, J.J., concur.

[No. 7091. Decided April 23, 1908.]

LOUIS G. HEYBROOK, *Respondent*, v. INDEX LUMBER COMPANY *et al.*, *Appellants*.¹

BOUNDARIES—CORNERS—CALLS—ESTABLISHMENT. Where the quarter section corners on the north and south sides of a section are in place, the dividing line between the east and west halves is a straight line between the said corners, and not an adopted line run on the magnetic variation given by the government surveyor's field notes.

SAME—LOST CORNERS. Where a quarter corner is lost, it must be located half way between the section corners.

TRESPASS—CASUAL CHARACTER—CUTTING TIMBER. Where a boundary line between two quarter section corners is in dispute, a land owner who adopts a line run on the magnetic variation called for in the field notes, without resorting to a proper method for determining the true line, is guilty of voluntary and not a casual or involuntary trespass, if he cuts timber on the adjoining tract.

SAME—JOINT TRESPASS—PARTIES—JOINDER. Where a timber company and a mill company were both owned and managed by the same individuals and are practically one concern and both were interested in the business of the removal of timber constituting a trespass, they may be joined in one action for damages for a joint trespass.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 8, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for trespass. Affirmed.

¹Reported in 95 Pac. 324.

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Opinion Per Curiam.

Brownell & Coleman (*Francis H. Brownell*, of counsel),
for appellants.

Cooley & Horan, for respondent.

PER CURIAM.—The respondent is the owner of forty acres of timber land described as the west half of the southeast quarter of section twenty, in township twenty-seven, north, of range ten, east of the Willamette Meridian, situated in Snohomish county, Washington. The appellant, H. J. Miller Lumber Company, owns the southwest quarter of the same section. In 1905 the appellant logged off its quarter section, and in so doing trespassed, so the respondent claimed, upon his land, cutting therefrom twenty-three trees, containing some 111,857 feet of saw timber. The trees after being cut were taken to the mill of the appellant Index Lumber Company and there sawed into lumber, which lumber the appellants afterwards appropriated to their own use. The respondent thereupon brought this action to recover the treble value of the trees, alleging that the trespass was not casual or involuntary, but was made at a time when the appellants had probable cause to believe that the land on which the trespass was committed was the property of the respondent. The cause was tried in the court below without a jury, and resulted in a finding and judgment for the respondent in the sum of \$419.46, being the treble value of the timber the court found to have been taken. This appeal is prosecuted from the judgment so entered.

The questions presented by the records are the following: (1) Was there in reality any trespass; (2) if there was a trespass, was the trespass casual or involuntary; and (3) was there such a joint action between the two defendants as to render them both liable for the trespass. We think the trial court correctly answered each of these questions. The quarter section corners on the north and south sides of the section in which the lands of the parties lay were in place. The dividing line between their lands was a straight line run

between these two corners. Instead of adopting this line the appellants adopted a line run on a magnetic variation of twenty-three and one-quarter degrees, because the United States government surveyor had given this as the variation of the magnetic needle when surveying the exterior lines of the section. But this variation cannot control over the fixed monuments. The true corner is always where the United States surveyor establishes it, whether this point coincides with the other data given or not.

It is said, however, that the corner taken to be the quarter section corner on the north side of the section was not the corner established by the United States government surveyor, and for that reason the appellants had a right to resort to the magnetic variation to determine the true line. But if this contention were true in fact, the rule contended for would not follow. If the corner on the north was actually lost, the line through the section should have been run from the known quarter corner to a post on the north line half way between the section corners, and this regardless of the magnetic variation reported by the government surveyor. We think, however, that the evidence fairly establishes the fact that the corner found on the north side of the section was the true quarter section corner, or, at least, a corner set at the place where the original government corner was established.

On the second question, we think the evidence justifies the court's findings to the effect that the trespass was not casual or involuntary. There was a dispute between the parties from the very start over the location of this line, and the appellants, instead of resorting to some proper method for determining the true line, adopted an arbitrary standard not sanctioned by usage or law, and cut up to the line so established regardless of the protests of the respondent. Under these circumstances it is too much to claim that the trespass was casual or involuntary.

On the last question the evidence shows that the two appellants are practically one concern; that the same individuals

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who own and manage the one also own and manage the other, and that the appellants were both interested in the business of removing the timber. There was, therefore, sufficient evidence on which to find a joint trespass.

The judgment is affirmed.

[No. 7139. Decided April 25, 1908.]

F. W. PEABODY et al., Respondents, v. GEORGE F. MEACHAM et al., Appellants.¹

TAXATION—JUDGMENT—DATE OF FILING CERTIFICATE—NUNC PRO TUNC ORDER CHANGING DATE—JURISDICTION. Where certificates of delinquency were, by the county treasurer, delivered to the county clerk for the express purpose of filing them, who failed to mark them as filed at that time, and they were temporarily withdrawn for the purpose of copying them until June 10th, when they were returned and marked filed as of that date, the court has power after judgment, by a *nunc pro tunc* order, to require the filing mark to be changed to May 9th, and it cannot be objected that the judgments were void because the certificates were not filed May 9th fifteen days before the date of the first publication of the summons, as required in order to give the court jurisdiction.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 17, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Alexander & Bundy, for appellants.

Brownell & Coleman, for respondents.

CROW, J.—Action by F. W. Peabody and Katie A. Peabody, his wife, against George F. Meacham and Lucia M. Meacham, his wife, to quiet title to real estate in Snohomish county. From a judgment in favor of plaintiffs, the defendants appeal.

¹Reported in 95 Pac. 322.

The respondents claim title under a county foreclosure and sale for delinquent taxes. There is no dispute as to the facts, which were stipulated. Those material to this appeal are, that taxes levied against the property for 1895 and prior years became delinquent; that on January 31, 1898, a certificate of delinquency was issued by the treasurer of Snohomish county; that on May 9, 1901, the county treasurer took the certificate of delinquency to the office of the clerk of the superior court, and delivered the same to a deputy clerk to be filed, but immediately thereafter temporarily withdrew it for use in his own office in completing a copy thereof; that at the time of its delivery the deputy clerk received the certificate for filing, but neglected to mark the same as having been filed, or to make any entry upon the books or records of the clerk's office showing such filing; that on May 24, 1901, publication of notice of foreclosure was commenced; that on June 10, 1901, the certificate of delinquency was returned by the county treasurer to the office of the clerk of the superior court, and that the clerk, not knowing of its previous delivery to his deputy, then marked it as filed on June 10, 1901, and made corresponding entries upon the records in his office; that on October 21, 1901, a default foreclosure judgment was entered, in pursuance of which the property was sold to Snohomish county; that on September 5, 1902, after the judgment and sale, the superior court of Snohomish county, without notice, made and entered an *ex parte nunc pro tunc* order, directing the clerk to change the filing marks upon the certificate of delinquency from June 10, 1901, to May 9, 1901, and to so amend the records in his office as to cause them to recite that the certificate had been filed on May 9, 1901; that except as above stated, the certificate was not in the office of the clerk of the superior court until June 10, 1901; that prior to that date no entry appeared in the office of the clerk of the superior court to show that it had been filed on May 9, 1901, or on any other date; that from and after June 10, 1901, until judgment and sale, and until September 22, 1902,

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all files, records, and entries in the office of the clerk of the superior court, recited that the certificate had been filed on June 10, 1901; that the respondents afterwards acquired title by deed from Snohomish county, and that the appellants afterwards acquired their alleged title from former owners, defendants in the foreclosure action.

The points raised by appellants are that it affirmatively appears from the foreclosure proceedings that the court was without jurisdiction, because the certificate of delinquency was not filed in the office of the clerk until June 10, 1901, which was after the first publication of notice had been made; that the statutes then in force, § 3, ch. 178, Laws of 1901, page 385, provided that the county treasurer should issue certificates of delinquency to the county and file the same with the clerk of the superior court, and that thereupon foreclosure proceedings should be commenced; that under this act the actual filing of the certificate was a condition precedent to the commencement of the foreclosure; that without such filing the court obtained no jurisdiction, and that the subsequent *nunc pro tunc* order changing the date of filing to May 9, 1901, which was made without notice on an *ex parte* application of the county attorney, was unauthorized and void. It is conceded and stipulated that the lots in dispute were included in the same foreclosure proceeding which was sustained by this court in *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267. The questions now raised were there determined adversely to appellants' contention. An examination of our opinion in that case will show that the facts now before us were there stated and passed upon. We then said:

"The next objection to the sufficiency of the foreclosure is, that the certificates of delinquency were not properly filed in the office of the clerk of the superior court before publication of summons. The complaint, however, shows that a *nunc pro tunc* order was made by the court in the foreclosure cause, by which it was declared that the certificates were in fact filed in the clerk's office on May 9, 1901, and it was directed that they

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be so marked, which was done, and the file mark was changed from June 10, 1901, to the above named date. That date was fifteen days before the first publication of the summons. It having been already determined that the court had jurisdiction of the cause by reason of the time the certificates were issued, and it appearing by the record that the certificates were filed in time, it follows that the point now raised relates to a mere irregularity which should have been raised in the foreclosure case. While the *nunc pro tunc* order was made after judgment, yet, assuming, as we must, that the record speaks the truth, the correction was such a one as could have been made during the progress of the action, under § 18, p. 299, Laws of 1899. Appellant is therefore estopped to raise the objection now. See Bal. Code, § 1767 (P. C. § 8704). Also, *Swanson v. Hoyle*, 32 Wash. 169, 72 Pac. 1011. The summons and its publication, we think, complied with the law. The property owner was therefore within the jurisdiction of the court, and was required to take notice of the action."

The arguments of the appellants now presented are substantially the same as those which were made in the *Washington Timber Company* case. The entire substance of their present contention is, (1) that the certificate of delinquency was not filed prior to June 10, 1901; (2) that the publication was commenced without authority of law; (3) that the judgment entered thereon was void; and (4) that the *nunc pro tunc* order was also void. The fact that on May 9, 1901, the county treasurer took the certificate of delinquency into the clerk's office for the express purpose of filing the same is not disputed, although the deputy clerk at that time failed to make the proper filing marks and entries. On June 10, 1901, an inadvertent and erroneous entry was made. Afterwards the judgment was entered and a sale made to the county, but later and before the appellants acquired their present alleged title by quitclaim deed from defendants in the foreclosure proceeding, and before respondents acquired their title from Snohomish county, the trial court, by a *nunc pro tunc* order, directed a correction of the filing marks and records to recite the actual facts.

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Syllabus.

"A court of record has an inherent power over its own records which includes the authority to require the correction of any errors that may creep into them. This power is not lost by lapse of time or the expiration of a term of court. The duty of a court to see that its records speak the truth is an affirmative and active one, and it is not a jurisdictional prerequisite to its performance that one party should invoke it by motion or that the other should have notice before action is taken." *Christisen v. Bartlett*, 73 Kan. 401, 84 Pac. 530, 85 Pac. 594.

The judgment is affirmed.

HADLEY, C. J., MOUNT, DUNBAR, FULLERTON, and RUDKIN, JJ., concur.

[No. 7094. Decided April 25, 1908.]

THE STATE OF WASHINGTON, *on the Relation of John D. Atkinson, Attorney General, Appellant, v. JAMES DUNLAP et al., Respondents.*¹

EVIDENCE—CUSTOM. Proof of a custom to take deeds for state roads in the name of a county is inadmissible where the statute requires them to be taken in the name of the state.

HIGHWAYS—ABANDONMENT TO COUNTY—SALE TO RAILROAD—RIGHTS OF STATE—CONTROL. Under Bal. Code, § 4338, authorizing a railroad company to appropriate any part of a public highway not within the limits of a municipal corporation, and providing that the county commissioners may agree upon the terms of the appropriation, county commissioners may sell to a railroad company a road which it had taken possession of and destroyed as a highway; and mandamus will not lie at the instance of the state to compel the county to oust the company and keep the road open, although the road was constructed in part with funds received from the state, where it would have been impracticable to keep the road in repair, the commissioners had constructed another road to take its place, and it appears that they were charged with the control of the road, and exercised their best judgment in the matter.

¹Reported in 95 Pac. 321.

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Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered May 3, 1907, denying a writ of mandate to compel the commissioners of a county to repair a highway appropriated by a railroad for right of way purposes. Affirmed.

The Attorney General, J. B. Alexander, Assistant, and Fred W. Neal, for appellant.

M. P. Hurd, J. C. Waugh, and Smith & Brawley, for respondents.

Root, J.—This action was brought by the state of Washington, on the relation of the attorney general, praying that a writ of mandate issue against the county commissioners of Skagit county, compelling them to repair that portion of a certain wagon road between the town of Blanchard, in Skagit county, and the line between that and Whatcom county, which road had been appropriated and destroyed by the Seattle and Montana Railroad Company. From a judgment of the superior court denying the writ, the state has appealed to this court.

By an act approved March 22, 1895 (Laws 1895, p. 458), the legislature provided for a state wagon road through the Cascade mountains, and made an appropriation therefor; and it also provided in the same act that there should be expended "the sum of \$4,000 for the purpose of laying out, establishing and constructing a wagon road from Blanchard, in Skagit county, to the boundary line between Skagit and Whatcom counties." The board of state road commissioners, acting pursuant to an understanding with the commissioners of Skagit county, expended the \$4,000 in the construction of two miles of the road extending from the county line south toward Blanchard, and the county commissioners expended \$6,000 in completing three miles more of the road. In August, 1901, the Seattle and Montana Railroad Company made a proposition to the board of county commissioners to purchase a right of way through the lands where this public

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road ran, and offered therefor the sum of \$8,000. The highway had been found to be a very expensive one to keep in repair, as it extended through a mountainous country and had many grades so steep that it could be used to little advantage. In consideration of \$8,000 the county commissioners consented to the railroad company entering into possession of portions of this road, and that company appropriated the highway at three points in such a manner as to destroy it as a thoroughfare. The commissioners thereupon caused to be surveyed and laid out another road from Skagit county to the Whatcom county line, connecting with the county road system of the latter county.

The appellant contends that the road in question was a state road, that the commissioners had no authority to authorize the railway company to appropriate or take possession of it, and that the company in so doing became a trespasser, and that it is the duty of the county commissioners to eject it therefrom, and repair the road as a public highway. Respondents contend that it was not a state road, but a public road under the supervision and control of the county commissioners, and that it was discretionary with them to abandon said road or sell the interests of the public therein whenever it was deemed proper so to do.

It appears that the commissioners laid out this road and that the rights of way therefor were obtained in the name of the county, and that it is known upon the public records of said county as the "John Behren's road." The railroad company in constructing its road made large cuts through the rock, and in so doing destroyed portions of this highway and made it impassable. Respondents call attention to the fact that the legislative act hereinbefore mentioned did not contemplate that the road from Blanchard to the county line should be a state road, and that this is evidenced by the fact that said road is not mentioned or referred to in the title of the act; that it was the purpose of the state practically to donate to Skagit county the \$4,000 to assist in the construction of this difficult piece of road whereby the two counties

might be connected. The appellant contends that the \$4,000 of state money was expended in contemplation of the expenditure by the county of the \$6,000, and that the commissioners had no right to abandon the road constructed pursuant to this arrangement. Sections 6 and 7 of the act of 1895 direct that the state road commissioners shall take deeds for rights of way in the name of the state, and that, where deeds cannot be obtained, a right of way may be condemned. In this instance, however, all the deeds for rights of way seem to have been taken in the name of the county. This would hardly indicate an intention to establish a state road instead of a county road. The action of the trial court in excluding evidence as to a custom of taking rights of way or waivers for state roads in the name of the counties is assigned as error. It would seem that proof of a custom of this character would hardly be permissible in the face of §§ 6 and 7 of the statute above referred to.

Section 12 of the legislative act of 1895 made it the duty of the county commissioners to keep the state road through the Cascades in repair. This law, however, was repealed in 1897, without any saving clause. There is nothing in the latter statute relating to the road in question here. Prior to the 24th of August, 1901, the railroad company had taken possession of this road and destroyed its usefulness as a highway, and the commissioners, believing it impracticable or impossible to repair the road, passed a resolution to the effect that the county should accept the \$8,000 from the railroad company, and that a quitclaim deed should be executed. This deed appears not to have been issued, and it is urged that the railroad company is in possession of this highway unlawfully and is consequently a trespasser. Bal. Code, § 4338 (P. C. § 7093), authorizes a railroad to appropriate any part of a public road not within the limits of a municipal corporation, and provides that the county commissioners of the county where the road is situated may agree upon the terms and conditions of the appropriation. Bal. Code, § 4334 (P. C. § 7089), provides that such railway shall be helden

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to the county commissioners or county for all expenses incurred in relocating and opening the portion of the road appropriated. It would appear under these statutes that the county commissioners were powerless to prevent this railway company from taking possession of this highway, and it would also seem that the commissioners were justified in making an adjustment with the railroad company whereby they obtained the \$8,000 for the benefit of the county. The new road, which was laid out and intended to give the service which had formerly been given by the abandoned road, was shown to have cost at the time of the trial some \$8,000, and to require some \$4,000 more for its completion. We think it satisfactorily appears from the evidence that it would have been highly impracticable to have repaired the old road, that it never could have been made a satisfactory highway, and that its continuance would have necessitated large expenditures, for which it would have given very poor service in return. We think it was a county road over which the commissioners had supervision.

There is no contention that they had any personal interest in the transactions involved or that their actions were in any wise attended by fraud or improper considerations. They appear to have exercised their judgment in dealing with a matter which the statute brings within their official province. The view we entertain upon the merits of the case makes it unnecessary for us to pass upon the question of the right of the state upon the relation of the attorney general to maintain a proceeding of this character.

The judgment of the superior court is affirmed.

FULLERTON, MOUNT, CROW, RUDKIN, and DUNBAR, JJ., concur.

[No. 6812. Decided April 27, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Northern Pacific Railway Company, Plaintiff, v. THE SUPERIOR COURT FOR YAKIMA COUNTY et al., Respondents.*¹

EMINENT DOMAIN—NECESSITY—CERTIORARI—REVIEW—EVIDENCE—SUFFICIENCY. Upon certiorari to review an order of condemnation by one railroad of part of the lands of another, the necessities of the two roads present questions of fact, and the findings of the trial judge will not be disturbed, where he had the advantage of seeing the witnesses, unless it is shown to be erroneous.

SAME—RIGHT TO CONDEMN—SUBSCRIPTION TO STOCK—EVIDENCE—SUFFICIENCY. Upon condemnation proceedings by a railroad company, a showing as to the subscription of its stock is sufficient although the principal portion was subscribed for by a stenographer, without means, employed in the office of the president of the company upon a small salary.

Certiorari to review an order of the superior court for Yakima county, Rigg, J., entered May 13, 1907, after a hearing on the merits, granting a petition to condemn a right of way through land owned by another railway company. Affirmed.

B. S. Grosscup and Ira P. Englehart, for relator.

H. J. Snively and Danson & Williams (Fred H. Moore, of counsel), for respondents.

ROOT, J.—The North Coast Railway brought an action to condemn a right of way for railroad purposes through a twenty-one acre tract of land owned by the Northern Pacific Railway Company in the city of North Yakima. The trial court, after due hearing, entered an order for the condemnation of a certain portion of the premises thus sought to be appropriated. Each company, feeling aggrieved by said order, has applied to this court for a writ of certiorari to review the proceedings of the superior court. It is urged by the North-

¹Reported in 95 Pac. 490.

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ern Pacific Railway Company that the taking by the North Coast Railway of the portion awarded by the trial court would seriously interfere with the purposes for which it, the Northern Pacific Railway Company, will need, and for which it intended to use, these premises in the future, to wit: for storage and switching yards, repair, cleaning and coaling tracks, for roundhouses, ice-houses, refrigeration of cars, and other purposes incidental to its railroad business. The North Coast Railway urges that the trial court did not allow it a sufficient amount of land, and that the refusal to allow it a certain additional portion seriously interferes with the plans of construction and operation of its proposed railway line.

It will be seen that these contentions present questions of fact and opinion rather than questions of law. We do not believe a discussion of the evidence would serve any useful purpose. From an examination of it and a study of the exhibits, we are not prepared to say that the trial court's conclusion was erroneous. We think it is justified. Hearing the evidence, seeing the witnesses, being familiar personally with the premises and the general conditions and environment, we are satisfied from the record that the honorable trial judge endeavored to be fair with both of these parties, and that his conclusion was equitable and just and sustained by the evidence.

It is urged by the Northern Pacific Railway Company that no proper showing was made of the subscription to the capital stock of the other company, in that the principal portion of said stock was subscribed for by a stenographer in the office of the president of the company, the stenographer being without financial means other than a salary of seventy-five dollars per month. In the light of former decisions of this court, the contention cannot be sustained. *State ex rel. Biddle v. Superior Court*, 44 Wash. 108, 87 Pac. 40; *Purdin v. Washington etc. Assn.*, 41 Wash. 395, 83 Pac. 723; *State ex rel. Oregon R. & Nav. Co. v. Superior Court*, 45 Wash. 321, 88 Pac. 334.

Finding no error in the record, the order of the superior court is affirmed.

HADLEY, C. J., DUNBAR, CROW, and RUDKIN, JJ., concur.

FULLERTON and MOUNT, JJ., took no part.

[No. 7184. Decided April 27, 1908.]

THE STATE OF WASHINGTON, *on the Relation of the Murhard Estate Company, Plaintiff, v. THE SUPERIOR COURT FOR CLARKE COUNTY et al., Respondents.*¹

COUNTIES—COUNTY OFFICERS—DEPUTIES—HIGHWAYS—ESTABLISHMENT—VIEW AND REPORT. The county engineer may appoint a deputy who has the same powers as his chief to view a proposed road and sign the report in his own name, under the general provisions of Bal. Code, §§ 1564, 1695, relating to deputies of county officers, and Laws 1907, p. 352, referring to the county "engineer or his deputy."

SAME—APPOINTMENT OF DEPUTY—RATIFICATION. The appointment of a deputy county engineer will be considered ratified by the county commissioners, where the commissioners accepted and acted upon his view and report of a proposed county road.

SAME—VALIDITY OF APPOINTMENT—COLLATERAL ATTACK. The appointment of a deputy county engineer cannot be questioned collaterally in an attack upon his view and report of a proposed county road.

HIGHWAYS—ESTABLISHMENT—COLLUSION—EVIDENCE—ADMISSIBILITY. Collusion between county commissioners and a railroad company in locating a proposed county road cannot be shown by the fact that the railroad company desired the location agreed to for its own purposes, where there was no evidence of improper influence or inducement.

SAME—EMINENT DOMAIN—REVIEW—COLLATERAL ATTACK—CONCLUSIVENESS. The question of the necessity for taking certain land for the location of a county road cannot be collaterally attacked on certiorari to review the order of condemnation where no appeal or certiorari was taken from the order establishing the road, and the commissioners had jurisdiction.

¹Reported in 95 Pac. 488.

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Application for a writ of certiorari to review an order of the superior court for Clarke county, McCredie, J., entered January 21, 1908, condemning land for county road purposes. Denied.

Milton W. Smith, for relator.

A. L. Miller and James P. Stapleton, for respondents.

ROOT, J.—This is an original application for a writ to review the proceedings of the superior court for Clarke county which resulted in an order condemning a portion of relator's property for county road purposes.

Relator relies upon three propositions of law, viz: (1) That the county commissioners had no jurisdiction to order the road established or to direct the prosecuting attorney to institute proceedings for condemnation; (2) that the location of the road along the route specified is not required because the property owners offered to dedicate an equally suitable route; and (3) that the county commissioners, in locating the road in such manner, acted in collusion with the Portland & Seattle Railway Company. It is argued by relator that the report of the deputy county surveyor is not sufficient to justify action by the county commissioners, for two reasons: (1) it was not made by the county engineer; (2) it does not give a description of each tract of land over which the road passes, with the name and place of residence or address of the owners.

Under the first point relator maintains that the county engineer was not authorized to employ a deputy, and second that, if so authorized, such deputy nevertheless had no power to act in the matter of viewing out a proposed road. Bal. Code, § 1564 (P. C. § 4006), provides that, in all cases where the duties of any office are greater than can be performed by the person elected to such office, he may employ, with the consent of the county commissioners, necessary help. Bal. Code, § 1695 (P. C. § 8631), provides that the county com-

missioners may allow such deputy or deputies to county officers as in their judgment the business requires. Section 6 of the act of 1907 evidently contemplates the appointment of a deputy county surveyor or engineer, where it reads, "the county engineer or his deputy." It is urged that this deputy signed his own name instead of that of the county engineer or surveyor. We think the manner of his signing the report was immaterial, and that as a deputy he had in this instance the same power as his chief, and that his report must be accepted as if made by the county engineer. *State v. Rosener*, 8 Wash. 42, 35 Pac. 357.

It is urged that the appointment of this deputy was not authorized or ratified by the county commissioners. Perhaps it may not have been authorized or approved expressly; but it appears that this report was received, accepted, and acted upon by the board of county commissioners, and we think for the purposes of this transaction that this in itself amounted to a ratification of the appointment of such deputy. Moreover, we do not think that this deputy's title to the office he was exercising can be questioned in the collateral manner herein attempted. *State v. Fountain*, 14 Wash. 236, 44 Pac. 270; *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95, 64 Pac. 909, 87 Am. St. 747, 54 L. R. A. 212; *Dane v. State*, 36 Tex. Cr. 84, 35 S. W. 661; *Wheeler & Wilson Mfg. Co. v. Sterrett*, 94 Iowa 158, 62 N. W. 675.

The alleged collusion between the county commissioners, which relator sought to prove, consisted, as shown by his petition, of the fact that the railway company, for purposes of its own, desired the county road to run where the commissioners decided to locate it, and that company and commissioners had agreed that the latter should so locate it. But it is not alleged, nor was any evidence tendered to show, that any improper influence or inducement was offered to, or brought to bear upon, said commissioners to occasion, or which did occasion, their action. We think the proffered evidence was properly excluded.

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It is urged that there was no necessity for taking this particular land as other land equally good had been tendered for the purpose. We think the character and contents of the original petition to the county commissioners and the report of the deputy surveyor to them were sufficient to give the board jurisdiction over the matter. The question of the propriety or necessity of taking this particular land was for the county commissioners, and their determination cannot be collaterally attacked. *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *State ex rel. Pagett v. Superior Court*, 47 Wash. 11, 91 Pac. 241. No appeal or review by certiorari was taken from the action of the commissioners in ordering the road established, and as the jurisdictional facts appear, the court was not required to go into matters over which the commissioners exercised their jurisdiction.

Finding no error in the proceedings of the superior court, the writ is denied.

HADLEY, C. J., DUNBAR, CROW, RUDKIN, and MOUNT, JJ., concur.

[No. 7226. Decided April 27, 1908.]

R. C. O'BRIEN *et al.*, *Respondents*, v. PERFECTION PILE
PRESERVING COMPANY, *Appellant*.¹

LOGS AND LOGGING—LIENS—AGENT OF OWNER—STATUTES—CONSTRUCTION. A person getting out logs and piling under a contract with the owner is an agent of the owner, within the meaning of Bal. Code, § 5930, giving a lien thereon in favor of certain persons rendering services at the instance of the owner or his agent.

SAME—LIEN—SERVICES INCLUDED. The lien given by Bal. Code, § 5930, in favor of every person performing labor or assisting in obtaining timber products, extends to hauling logs and piles before being worked into a finished product, and is not restricted to railroads and steamboats by the clause giving such carriers liens for hauling or towing.

¹Reported in 95 Pac. 489.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 2, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

George E. de Steiguer, for appellant.

Morris, Southard & Shipley, for respondents.

Root, J.—This action was brought by plaintiffs to recover for services claimed to have been rendered in obtaining and securing sawlogs and piles, which were removed by the owner, this appellant, after plaintiffs had filed liens for their services. From a judgment in plaintiffs' favor, the defendant company appeals.

Defendant Hopgood had a contract for getting out this timber. Plaintiffs claim that he hired them as such contractor, and that as such he was the agent of the defendant company. The latter urges that O'Brien was jointly interested in the contract with Hopgood, and performed the services in question as such contractor. It also claims that Hopgood as contractor was not its agent—that the statute as to loggers' liens is different from others which expressly constitute the contractor an agent for the owner. The last question involves the construction to be placed upon Bal. Code, § 5930 (P. C. § 6082), which reads:

“Every person performing labor upon or who shall assist in obtaining or securing saw logs, spars, piles, cord wood, shingle bolts or other timber, and the owner or owners of any tugboat or towboat which shall tow or assist in towing, from one place to another within this state, any saw logs, spars, piles, cord wood, shingle bolts or other timber, and the owner or owners of any logging or other railroad over which saw logs, spars, piles, cord wood, shingle bolts or other timber shall be transported and delivered, shall have a lien upon the same for the work or labor done upon, or in obtaining or securing, or for the services rendered in towing, transporting or driving, the particular saw logs, spars, cord wood, single bolts or other timber in said claim of lien described, whether

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such work, labor or services was done, rendered or performed at the instance of the owner of the same or his agent. The cook in a logging camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned."

We think that a person getting out logs and piling under a contract with the owner is an agent within the meaning of this statute.

Appellant further contends that the statute provides no lien for merely hauling timber products after the same have been cut, except when hauled by tugboats, towboats, logging or other railroads. *Ryan v. Guilfoil*, 18 Wash. 373, 43 Pac. 351, is cited in support of this contention; but we think it fails to give it support—that it has no application to a case like this where the logs and piles were hauled before being worked into a finished product. The case of *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067, shows the liberality with which this court construes the statute in question.

The question as to whether O'Brien was a joint contractor with Hopgood, or whether he performed the service as one hired by Hopgood, was submitted to a jury. Its verdict in favor of respondents must be held conclusive here, as we find nothing in the evidence, instructions, or elsewhere justifying its disturbance.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, CROW, RUDKIN, FULLERTON, and MOUNT, J.J., concur.

[No. 7200. Decided April 29, 1908.]

**PETER ANDERSON et al., Appellants, v. McCARTHY DRY
GOODS COMPANY et al., Respondents.¹**

NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR. The fact that a basket used in an overhead carrier system for conveying parcels in defendant's store fell upon and injured a customer in the store establishes a *prima facie* case of negligence, upon the principal of *res ipsa loquitur*, although the system was of standard make and in general use.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 12, 1907, upon granting a nonsuit in an action for personal injuries, after a trial before the court and a jury. Reversed.

John E. Humphries and Geo. B. Cole, for appellants.

Kerr & McCord, for respondents.

Root, J.—This was an action by appellants for damages alleged to have been sustained by appellant Mrs. Anderson, on account of a personal injury received by a basket falling from an overhead carrier system in the store of the respondent company. From a judgment of nonsuit, this appeal is prosecuted.

The material facts shown were about these: Mrs. Anderson entered respondent company's store to make some purchases, and while there in the capacity of a customer, a basket used upon respondent's carrier system, conveying goods to and from the wrapping counter, fell or was precipitated from the track, and struck her. No evidence was introduced, except as to facts hereinbefore stated, showing or tending to show that the apparatus was improperly installed or out of repair. The evidence showed that the system was one of standard make and in general use. Appellants invoke the rule of *res ipsa loquitur*, asserting that the fact of the basket falling or being

¹Reported in 95 Pac. 325.

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precipitated from the carrier track upon appellant under the circumstances mentioned was sufficient to establish a *prima facie* case of negligence as against respondent company.

The rule of *res ipsa loquitur* must be invoked sparingly and applied only where the facts and demands of justice make its application essential. Negligence is never to be presumed from the mere happening of an injury or accident. But when certain physical conditions are established, together with certain happenings in connection therewith, it is sometimes permissible to deduce therefrom a conclusion of the fact of negligence.

"Though, as stated above, negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injuries complained of or the circumstances surrounding may well warrant an inference or presumption of negligence, such a situation being described by the familiar phrase *res ipsa loquitur*. As a matter of course, the application of the maxim in question depends on the peculiar facts and circumstances of each particular case. . . . The presumption which arises by virtue of the application of the maxim *res ipsa loquitur* is usually referred to as a *prima facie* or rebuttable presumption, which, when it arises, merely shifts the burden upon the defendant to disprove the inferred existence of negligence by evidence that as a matter of fact all proper and reasonable care was employed." 21 Am. & Eng. Ency. Law (2d ed.), 512, 513.

"Sometimes the duty which the defendant owes to the plaintiff is of such a nature that proof that the accident happened to the plaintiff under certain circumstances will be of such legal value as to afford evidence of negligence on the part of the defendant, and make out a *prima facie* case in favor of the plaintiff. This is the doctrine of *res ipsa loquitur*, and it is not applied unless the thing causing the accident is under the control of the defendant or his servants, and the accident is of a kind which does not ordinarily occur *if due care has been exercised*. . . . It is therefore generally more correct to say that there are cases where the fact that the accident happened *under given conditions, and in connection with certain circumstances*, will amount to evidence of negligence sufficient to charge the defendant. To illustrate this, let us take again the case of a traveler in the highway. While

proof of the mere fact that he was struck and knocked down by some substance in front of A's building will not entitle him to recover damages of A., yet suppose that he is able to show (1) that he was struck by some solid substance; (2) that this substance was a bale of goods; (3) that, at the time it struck him, this bale of goods was being lowered from the window of a warehouse above the street; (4) that A. was owner of this warehouse. This, it has been held, will make out a *prima facie* case against A. But A. might rebut this *prima facie* case by showing (1) that the bale was being lowered without his knowledge, by the servants of another person; or (2) that the traveler was himself one of the persons engaged in lowering the bale; or (3) that although the plaintiff was using the sidewalk as a traveler, yet he had stopped, and was standing still, under the window from which the bale was being lowered, and that he was warned of the danger and told to stand from under, but negligently failed to do so. . . . A person is lawfully on the street, when an adjoining building falls down, injuring him. In a suit against the owner of the building, he makes out his case by showing the facts stated, without more. The reason is, that the *owner of the building adjoining a street or highway* is under a legal obligation to take reasonable care that it is kept in a *safe condition*, so that it will not fall into the highway, injuring persons lawfully there. If it did so fall, every fair-minded man would draw the inference that it had not been properly inspected and kept in repair; and if the contrary were true, it is easy for the defendant to show that fact. In another case, it appeared that the defendants, who occupied for business purposes the second and upper floors of a building were hoisting a box, weighing about five hundred pounds, to their rooms, by means of iron hooks attached to its sides. Just as it reached the second floor the hooks broke, and the box fell, broke through the hatchway on the first floor, and struck and injured the plaintiff, who was lawfully in the basement. This, without more, was held evidence of negligence on the part of the defendants warranting a verdict for the plaintiff. So, proof of the fact that *water escaped from the defendant's hydrant* into the plaintiffs' apartment, in the story below, makes out a *prima facie* case of negligence, which the defendant must excuse or pay damages. So, the fact that *tools or other objects fall from an elevated railroad and injure a person thereunder*, in the absence of explanation is generally held

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to raise a presumption of negligence on the part of the railroad company." 6 Thompson, Commentaries on Law of Negligence, §§ 7635, 7636.

Ordinarily it must be a peculiar and exceptional case that will justify the invocation of this rule, except in cases against common carriers where it is frequently applied. However, where the proven or admitted physical conditions, together with the other established facts, show that the occurrence is one which could not ordinarily in the nature of things happen but for negligence on the part of defendant, and it further appears that negligent operation of the apparatus is naturally accompanied with danger, and its control and the knowledge of its condition are practically limited to the defendant or his servants, and evidence as to the same is unavailable except through him or them, the rule may usually be invoked by one to whom the defendant owed a duty of protection and who was under no obligation to, and did not, know or have reason or opportunity to know of the danger that threatened him. The operation of baskets upon such a carrier system is fraught with some danger to customers over whose heads the apparatus is suspended. While a six or eight pound wire basket with metallic wheels could not be presumed to inflict much of a physical injury if it fell upon a person, yet it might occasion some personal injury as well as damage to the customer's clothing. The danger is greater than from the usual conditions obtaining in a store without such a system, and the knowledge of the apparatus, as to its being or not being in repair, is peculiarly with the storekeeper or his servants in charge. For this reason greater care is required to protect his customers than would be demanded concerning the ordinary conditions existing in such a store not having such apparatus.

When a plaintiff proves the existence of this carrier system and the falling of the basket therefrom, causing damage, we think facts are shown from which a reasonable mind might properly infer that the apparatus was improperly con-

structed or out of repair. Hence, a case for the jury is thus established. This case may be overcome by showing that the apparatus was properly installed and in good repair, or that it had been properly inspected and nothing wrong discovered. This, defendant could easily prove if such were the facts. Upon rebuttal, of course, no substantive evidence could be introduced by a plaintiff except such as tended to rebut the particular probative facts established or sought to be established by respondent. In other words, plaintiff could not rely upon the rule in his case in chief and then upon rebuttal introduce evidence of negligence that should have been produced in making his case. We think the rule here laid down is fair and just.

A carrier system such as this is a mechanical contrivance the operation of which requires some peculiar skill or knowledge not possessed by the average person, and carelessness in its operation or maintenance is calculated to endanger customers impliedly invited within its presence. Such a person would not ordinarily have an opportunity to inspect the apparatus, or have sufficient technical knowledge of the device to know whether or not it was properly adjusted or in repair even if he did examine it. It would naturally be difficult to get evidence of its condition except from its owner or his servants. On the other hand, the owner, having the system in his possession and under his control and being legally bound to properly inspect and know of its condition, could readily produce evidence thereof. If the condition was proper, he could easily show it and thus avoid liability. If improper and dangerous, he should not, as a matter of justice, escape liability, because from the peculiar nature of the thing the injured person was unable to get evidence of its condition.

Appellants cite, apparently with much reliance, the case of *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560. A rehearing has been granted in that case, and the decision of the case at bar is made without taking into consideration the opinion in the case cited. The rule invoked has

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been recognized, however, in the cases of *Firebaugh v. Seattle Elec. Co.*, 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990, 2 L. R. A., N. S., 836, and *Williams v. Spokane Falls & Northern R. Co.*, 39 Wash. 77, 80 Pac. 1100. In the case of *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. 630, 52 L. R. A. 992, the court of appeals of New York applied the rule in a case where a passenger elevator in a building became unmanageable and a heavy counterweight fell down the shaft, killing a passenger in the elevator cage. In that case the trial court gave the following instruction:

"There is another rule which the plaintiff asks me to call your attention, and I am going to call to your attention the rule that where an accident happens which, in the ordinary course of business, would not happen if the required degree of care was observed, the presumption is that such care was wanting, and if you find in this case that this accident was one which, in the ordinary course of business, would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting."

This was upheld by the court of appeals, which, among other things, quoted from Shearman & Redfield on Negligence, § 59, as follows:

"It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer;"

and, in its discussion, used the following language:

"The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present."

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In the case of *Uggla v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857, it was held that, where a coachman driving in the street was struck by part of a skylight blown from an adjoining building, the incident itself raised a presumption of negligence under the rule of *res ipsa loquitur*. The rule is applied to cases of injury from falling objects perhaps more than to any other class of cases, aside from those having to do with common carriers. Such cases were the following: *Kaples v. Orth*, 61 Wis. 531, 21 N. W. 633; *Morris v. Strobel & Wilken Co.*, 81 Hun. 1, 30 N. Y. Supp. 571; *The Joseph B. Thomas*, 81 Fed. 578; *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 31 N. E. 870, 30 Am. St. 678; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Scheider v. American Bridge Co.*, 78 App. Div. 163, 79 N. Y. Supp. 634; *Mentz v. Schieren*, 36 Misc. 813, 74 N. Y. Supp. 889; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Weller v. McCormick*, 52 N. J. L. 470, 19 Atl. 1101; *Schnizer v. Phillips*, 108 App. Div. 17, 95 N. Y. Supp. 478. See, also, *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Adams v. University Hospital* (Mo.), 99 S. W. 453; *Connolly v. Des Moines Inv. Co.*, 130 Iowa 633, 105 N. W. 400; *Weber v. Lieberman*, 47 Misc. 593, 94 N. Y. Supp. 460; *Lubelsky v. Silverman*, 49 Misc. 133, 96 N. Y. Supp. 1056; 6 Current Law, 772.

We think the case should have been submitted for the jury to say whether negligence of defendant was established by the facts proved, or respondents should have been permitted, if they desired, to show that the carrier system was properly installed and that it was in good repair, or that it had been properly inspected without anything defective being discovered, or that the basket was caused to fall by some person or influence for whom or which respondent was not responsible.

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The judgment of the honorable superior court is reversed, and the case remanded for a new trial.

HADLEY, C. J., RUDKIN, DUNBAR, CROW, and FULLERTON, JJ., concur.

[No. 7031. Decided April 29, 1908.]

CHARLES A. WOELFLEN, *Respondent*, v. LEWISTON-CLARKSTON COMPANY *et al.*, *Appellants*.¹

APPEAL—BOND—SUFFICIENCY. Upon appeals from the final judgment and from an order denying a new trial, only one bond on the appeal from the final judgment need be given.

SAME—OBLIGEE. An appeal bond by defendants is sufficient without naming as obligee a codefendant dismissed from the action and not joined in the appeal.

SAME—SUPERSEDAES—AMOUNT. That an appeal and supersedaes bond is not large enough to cover interest accruing is not ground for dismissal of the appeal.

SAME. An appeal and supersedaes bond by defendants need not be large enough to cover the costs of a codefendant dismissed from the action and not joining in the appeal.

APPEAL—PARTIES—NOTICE—STATEMENT OF FACTS—SERVICE. A co-party dismissed from the action is not an adverse party upon whom service of notice of appeal, or of the statement of facts, need be made.

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SAFE PLACE—LIGHTS—DUTY TO DISCOVER DANGER—VICE PRINCIPALS. An experienced electrician, who received a shock from highly charged wires while superintending the removal of a burned out transformer in a power house, is guilty of contributory negligence, as a matter of law, where it appears from his testimony that he went upon a cross-arm four or five feet below the ceiling, that he was standing over three high tension wires known to him to be carrying a heavy load, and from which there were small wires or lightning arresters leading through the roof which were commonly found in all power houses, that he came in contact with the small wires, and that it was too dark in that place for him to see the

¹Reported in 95 Pac. 493.

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small wires; since it was recklessness to go into a dark place where he knew there were dangerous wires and might be others, there being no direction or necessity that he do so, and since he was in charge as a vice principal and was bound to see to the safety of the place.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered May 14, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Sturdevant & Bailey and *I. N. Smith*, for appellants.

Elmer E. Halsey and *Ben F. Tweedy*, for respondent.

Root, J.—This is an appeal from a judgment in favor of the plaintiff, in an action brought to recover damages for personal injuries sustained in the power house owned by the Lewiston Light Company, and operated by the Lewiston Water & Power Company, in Asotin county, Washington. Said appeal is prosecuted by the latter company and the Lewiston-Clarkston Company, which was incorporated subsequent to the time of plaintiff's injury, and which it is claimed took over the property of the other two companies subject to all liabilities.

Respondent has interposed a motion to dismiss the appeal, upon the following grounds, to wit: (1) That there are two appeals, one from the final judgment, and one from the order denying a new trial, with only one bond given on the appeal from the final judgment; (2) that the only obligee mentioned in the bond is respondent Woelflen, whereas the bond should run to him and to the Lewiston Light Company, as to which the action was dismissed in the trial court and which did not join in the appeal; (3) that the bond, being conditioned both as an appeal and supersedeas, is insufficient in amount, inasmuch as it is not in an amount large enough to cover interest on the judgment from date of entry; (4) that as costs were allowed to the Lewiston Light Company upon dismissal of the action as to it, these costs must be

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taken into consideration and covered by the stay bond; (5) that the Lewiston Light Company was, after the dismissal of the action as to it, an adverse party to these appellants, and that the attorneys who had appeared for it and the appellants had no right to accept service of notice of appeal for that company. We do not think the motion can be sustained upon any or all of the grounds assigned. Bal. Code, §§ 5081, 5082, 6500-6506, 6521 (P. C. §§ 720, 721, 1049-1054, 1069); *Edgecomb v. Creditors*, 19 Nev. 149, 7 Pac. 533; *Williams v. Dennison*, 86 Cal. 480, 25 Pac. 244; *Nolan v. Montana Cent. R. Co.*, 24 Mont. 327, 61 Pac. 880; *Paland v. Chicago etc. R. Co.*, 42 La. Ann. 290, 7 South. 899; *Oleson v. Wilson*, 20 Mont. 544, 52 Pac. 372, 63 Am. St. 639; *Berghoff v. McDonald*, 87 Ind. 549; *Westland Publishing Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096; *Douglas v. Badger State Mine*, 43 Wash. 715, 86 Pac. 858; *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. The motion to dismiss is overruled.

Respondent also moves to strike the statement of facts. This motion is based upon the ground that an order of extension of time for filing was made upon a motion no notice of which was served upon the Lewiston Light Company, and that the proposed statement was not served upon that company. Respondent contends that this company was an "adverse party," as contemplated in Bal. Code, § 5058 (P. C. § 675). We are unable to agree with this contention. We perceive no reason for its being considered an adverse party to the appellants or either of them, and no reason for requiring the statement to be served upon it, or notice to or service upon it of any motion concerning the statement of facts or anything else having to do therewith. *Doremus v. Root*, *supra*. The motion to strike the statement of facts is denied.

The plaintiff was employed as superintendent or general foreman in charge of the company's outside work, such as erecting poles and stringing wires. In view of the conclusion which we have reached, it will be necessary to refer to only

one of the defendants, the Lewiston Water and Power Company, which we will speak of as "the company." In the power house were three transformers, each five feet high and four feet square, composed of a case built of corrugated iron, resting in a frame made of angle iron, and in each case there was a "core," a receptacle containing a coil of wires immersed in oil for insulating and cooling purposes. The three transformers were located close together. In the operation of the plant, the transformer farthest to the south burned out. The manager of the company telephoned from Lewiston, directing plaintiff to take such assistance as he needed to the power house and lift the core out of this transformer so that the electrician could repair it. The manager sent a large block and tackle, weighing about five hundred pounds, consisting of pulleys and chains, for the purpose of doing this work. The plaintiff was an experienced electrician or worker about electrical plants and appliances, having been in that work for seventeen years, during several of which he was superintendent of a plant in Wisconsin, and later having assisted in putting together the transformers for this defendant company at Lewiston, Idaho.

After being directed as aforesaid by the manager to take the core out of this transformer, he took men for that purpose and was assisted by others whom he found at the power house. The work was undertaken under his direction and supervision. Overhead at the place where the ceiling would naturally be, there were joists running across the building, and upon these were some boards making a floor or platform over the transformer. The plaintiff went up to this position after having braced the joists, or caused them to be braced and supported so that the weight could be lifted by attaching the block and tackle to the joists. To the latter a small block and tackle were fastened, with which it was intended to haul up the large chain block which was to be used in raising the heavy core. A noose was made in the rope which was to be caught in an iron hook of the block and tackle. In order to

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hook them together, plaintiff climbed down from the platform where he had been standing, to a cross-arm which projected toward the center of the room from the southeast corner of the power house and about four or five feet below the ceiling joist. Upon this cross-arm there were three high tension wires each carrying ten thousand volts of electricity. That they were there and so charged with electricity was known to the plaintiff at that time, as he admits in his evidence. All of the transformers had been "killed down," as the expression is used by the electricians, meaning that the current of electricity had been cut off from them. This work was being done in the evening, the room being somewhat lighted by certain small lights but principally by a two thousand-candle power arc light, which is about the size and character of the ordinary street light. The room was in size about twenty-five by fifty feet. When plaintiff jumped down from the cross-arm, he stood with one foot on one side and one on the other of one of these highly charged electric wires. Connected with these were two small wires leading up to and through the roof. These uprising wires are commonly called "risers" or "lightning arresters," and are commonly found in all power houses. Plaintiff testified that he never knew of a power house without them. While plaintiff was attempting to connect the noose of the rope with the hook aforementioned, he received an electric shock and was seriously injured. At the time, he did not know how he received this shock. On the witness stand he said, however, that he now knew that his hand came in contact with one of these risers. He testified that he did not know of the presence of these lightning arresters, had never been told of their being there, and that he did not see them because it was too dark to permit of their being seen. Other witnesses who were working there under his direction at the time testified that they saw the wires, and that they were plainly visible.

It is urged by plaintiff that the company was guilty of negligence in sending him, without warning, into a place that

was dangerous by reason of the presence of these two wires unknown to him. The appellants urge, first, that there were several ways by which this work could have been done, any one of which would have been a perfectly safe method, but that plaintiff neglected to choose or follow a safe plan, but voluntarily chose a dangerous one. They say that a perfectly safe method would have been to have moved the transformer out from under these highly charged electric wires and to have lifted out the core at a place where there would have been no occasion to come near any of the wires. There was some evidence going to show that this method was suggested to the plaintiff. It is also urged by the appellants that the physical conditions, as well as the great preponderance of evidence, show that there was sufficient light to have seen these two perpendicular wires, and that it was carelessness and recklessness on the part of the plaintiff to have come in contact with either of them. They also urge that there was no occasion for plaintiff to leave the platform and go down upon this arm where he would be in close contact with dangerous wires. It will not be necessary for us to pass upon these questions. For another reason, we believe that the evidence of the plaintiff himself must defeat his recovery.

Assuming that the place where plaintiff went was too dark to permit of his seeing these two wires, we think that the going of an experienced electrical workman into a dark place of this kind where he knew there were several highly dangerous wires and might be others, was in itself a grossly negligent act. He was not directed as to the particular manner or place in which he should do the work. He was sent there in charge of the work, and had supervision of all the men who were assisting to accomplish it. He was not only in duty bound to exercise ordinary care to protect himself, but he likewise owed a duty, both to his employer and to the men working under him, to use ordinary care in choosing and carrying out the methods of doing the work. To illustrate: suppose on account of the darkness of the place, he had received a shock

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and fallen upon one of the workmen, or dropped something, injuring the latter. Doubtless the injured workman would have had a cause of action against the company. Such workman could have alleged that plaintiff, as vice principal of the company, owed a duty to inspect the premises and not to go into a dark place where he knew, or might have known by reasonable inquiry or inspection, that there were dangerous electrical wires which might cause him to fall or drop some of the tools or appliances on one of the workmen below. Plaintiff being in charge of the work and not being limited by his orders as to the matter of light and the methods of handling the apparatus necessary, it was his duty first of all to see that the premises were in a reasonably safe condition for the doing of the work. Knowing, as he says he did, of the presence of the three large, heavily charged wires, and knowing that power houses were usually equipped with risers or lightning arresters, and without any reason to suppose that this power house was an exception to the rule, it was incumbent upon him to either secure sufficient light to reveal the true condition of the surroundings of this cross-beam before he climbed down upon it, or to make inquiries or an examination of some kind by which the presence of dangerous wires would have been known to him. Had he been working under the immediate direction of a superior officer, without any knowledge of the situation, and had obeyed an order to get upon this beam, relying upon the duty of the master to have the place safe, a very different question would be presented.

It is undoubtedly the duty of the master to use ordinary care to provide a reasonably safe working place for his servant. Where the master is a corporation this duty must be performed by it through certain persons who become, by reason of the duty thus imposed upon them, vice principals of the master, and it is upon these vice principals that the company, as such master, relies for information and for the proper preparation and care necessary to have the premises

in the safe condition required by law. When the master, whether a natural person or a corporation, authorizes one of its superintendents to take charge of and supervise and carry out a certain undertaking in connection with its industrial operations, it becomes the duty of that servant to perform as and for the master those duties which the law places upon the latter. In this instance the plaintiff, being the superintendent in control of this undertaking, was charged with the duties just mentioned; and in failing to provide a sufficient amount of light or to have it properly adjusted, or to in some other manner ascertain the dangerous conditions of the working place, he clearly neglected his duty to his employer.

Plaintiff claims that he was not familiar with the interior arrangements of the power house; that, although he had been working for the company for some years, he had not on an average been in the power house more than two or three times a month. He testified, however, that the foreman or engineer in charge of the power house was working with him and under his directions at the time of the accident, and there is no reason shown why he may not have learned from such assistant all about the conditions of the wires had he desired so to do: and no reason is given for not adjusting the lights so that all the wires in that vicinity could have been distinctly seen.

It is well settled that a servant cannot recover because of the dangerous condition of a working place, when such condition is as obvious or well known to him as to the master, or by the exercise of reasonable care by him would have been, or where it was the duty of the servant to ascertain as to the dangerous condition of the place, which duty he has neglected. In the case of *French v. First Avenue R. Co.*, 24 Wash. 83, 63 Pac. 1108, an engineer, recently placed in charge of a street railway power house having a large amount of machinery, was killed, and one of the reasons assigned for liability was that the place was insufficiently lighted and by reason thereof he did not notice certain defects that occasioned his fall into a large wheel. This court said: "If there was

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not sufficient light the engineer knew it," and laid stress upon the fact that the machinery in question was under the control of the engineer himself, saying, among other things: "It certainly is the duty of the engineer to observe, examine and understand the machinery which he is operating." In that case the engineer in charge was the person injured. In the case at bar the engineer ordinarily in charge of the room was working under this plaintiff who was in charge of the work then being done. The duty to know of the condition of the working place rested upon this plaintiff equally as much as it did upon the engineer in the case just cited.

The case of *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410, was one where a lineman was injured by an electric shock received as a result of a broken insulator on a telephone pole. The opinion has a strong bearing upon the facts of the case at bar. Among other things, the court said:

"Corporations of this kind act through employees. Necessarily they cannot act in any other way. An inspection of their lines and posts and insulators must be made by the employees. . . . The respondent testified that he knew the power of electricity, and the danger that would be incurred by coming in contact with a live wire; that he knew that, if the insulator broke, the result would be that the wire which he touched would be charged; and he knew also that porcelain insulators frequently did break. It seems to us that this brings him within the rule which we have announced above—that when he accepted the employment, that was necessarily hazardous, he assumed this risk, which under all the testimony, was an ordinary risk, and that he did not exercise the discretion which he ought to have exercised in testing this wire. . . . While there is no gainsaying the rule that under ordinary circumstances the employee has the right to rely upon the fact that the master will furnish him a safe place to work and safe appliances, yet the law does not intend that this shall be a blind and unreasonable reliance, but that reasonable men shall exercise in a reasonable manner the faculties of which they are possessed. It seems to us it would only have been such reasonable exercise of prudence upon the part

of the respondent in this case to have tested this wire before he touched it. . . . In this case it was equally within the knowledge of the master and the servant that this was a dangerous employment, and it cannot be said that there was negligence on the part of the master, and absence of rashness on the part of the servant, or that the servant used his skill, to protect himself in the course of his employment. He had sufficient skill, according to the undisputed testimony, to protect himself, and he had the apparatus at hand for testing the insulator and the wires. . . . We think, from an investigation of the whole, case, that it appears from undisputed testimony that plaintiff did not exercise reasonable care in the investigation of the dangers which he knew were incident to his employment, and that had he exercised such care, and made the tests which reasonable prudence would have dictated, he would have had knowledge of the danger which beset him."

In *Jones v. Moran Bros. Co.*, 45 Wash. 391, 88 Pac. 626, a painter aboard a ship undertook to walk through a dark compartment between decks where there was a hatchway into which he fell. As he knew there was a hatchway and knew that it was dark, this court held that, by going through there without a light and at a speed so great as to cause him to stumble over the coamings of the hatch, he was negligent, such negligence on his part defeating a recovery.

In *Steeple v. Panel & Folding Box Co.*, 33 Wash. 359, 74 Pac. 475, plaintiff fell off a platform in the dark. He claimed that he did not know it was without a railing, and was going to look for his hat which had blown off. Among other things, the court said:

"When he picked up the lantern to look for his hat, instead of using the lantern, he negligently moved without bringing the lantern to bear. There were other lanterns there, all under his supervision and care, and it was his duty to prepare all the light that was necessary for the work which was being done. Consequently he cannot complain that his injury was caused by not properly lighting the platform. . . It is true the plaintiff testifies that he did not know that the platform was without a guard, but a plaintiff cannot recover simply by making a statement of that kind,

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if, under the circumstances, it was his duty, as a reasonably prudent man, to have made such an examination as would have resulted in the desired information."

26 Cyc. 1169, says this:

"It is not necessary that the servant should be warned of every possible manner in which injury may occur to him, or of risks that are as obvious to him as to the master, or which are readily discoverable by him by the use of ordinary care, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing him to possess."

Thompson, Commentaries on the Law of Negligence, vol. 4, § 4063, says:

"The master is not under any duty to warn or instruct servants who have already enjoyed an ample opportunity to become acquainted with the danger. Servants are expected to keep their eyes open and exercise such a reasonable care for their own safety as their situation permits."

See, also, *McClellan v. Gerrick*, 48 Wash. 524, 93 Pac. 1087; *Weideman v. Tacoma R. & Motor Co.*, 7 Wash. 517, 35 Pac. 414; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679; *Smith v. Hecla Mining Co.*, 38 Wash. 454, 80 Pac. 779; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Robare v. Seattle Traction Co.*, 24 Wash. 577, 64 Pac. 784; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A., N. S., 283; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 52; *Ford v. Heffernan Engine Works*, 48 Wash. 315, 93 Pac. 417; *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711; *McGorty v. Southern New England Tel. Co.*, 69 Conn. 635, 38 Atl. 359; *Moulton v. Gage*, 138 Mass. 390; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Griffin v. Ohio & M. R. Co.*, 124 Ind. 326, 24 N. E. 888; *Dixon v. Western Union Tel. Co.*, 68 Fed. 630; Wood, Master & Servant, §§ 328, 366; Beach, Contributory Negligence, §§ 299, 346; 1 Bailey, Master & Servant, § 62; 20 Am. & Eng. Ency. Law (2d ed.), pp. 78, 96, 130, 131, 142, 149; 26 Cyc. 1169, 1171, 1188, 1202, 1236, 1241; 4 Thompson,

Com. on the Law of Negligence, §§ 4057, 4062, 4063, 4076, 4079.

The judgment as against these appellants is reversed, and the case remanded with instructions to dismiss the action.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 6995. Decided May 11, 1908.]

E. L. FARNSWORTH, *Respondent*, v. TOWN OF WILBUR *et al.*,
*Appellants.*¹

INJUNCTIONS—RELIEF—ACTS ALREADY PERFORMED—JUDGMENT—FORM—PLEADINGS—AMENDMENT. In an action to enjoin the council and officers of a town from compromising and satisfying a judgment, a judgment enjoining the acts is irregular where it appears that the acts have already been performed; and the court should, on its appearing that the plaintiff is entitled to relief, give judgment setting aside the compromise and satisfaction, allowing the pleadings to be, or considering them, amended to conform to the proofs.

MUNICIPAL CORPORATIONS — COUNCIL — POWER TO COMPROMISE—CLAIM—INJUNCTION. A town council has no authority to compromise and satisfy a valuable judgment in favor of the town by accepting from the judgment debtors a small sum, and will be enjoined from so doing at the suit of a taxpayer.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered March 20, 1907, upon an agreed statement of facts, granting an injunction to prevent a city and its officers from compromising a judgment entered in favor of a municipality. Modified.

E. F. Scarborough and Neal, Sessions & Myers, for appellants.

Merritt, Hirschman, Oswald & Merritt, for respondent.

¹Reported in 95 Pac. 642.

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Opinion Per FULLERTON, J.

FULLERTON, J.—This is an action for injunctive relief. It was tried upon the following agreed statement of facts:

“(1) That the town of Wilbur is a municipal corporation of the state of Washington, organized and existing as a city of the fourth class under and by virtue of the laws of the said state relative to municipal corporations.

“(2) That the defendants L. Lewis, W. W. Howells, F. T. Bump, W. J. Browne and James A. Muir are the duly elected, qualified and acting members of the town council of the town of Wilbur.

“(3) That the defendant Peder Faldborg is the duly elected, qualified and acting Town Treasurer of said Town of Wilbur.

“(4) That on or about the 13th day of March, 1906, judgment was entered by the superior court of the state of Washington in and for the county of Lincoln, in an action wherein the defendant the town of Wilbur, was the plaintiff, and wherein one J. E. Nave, one E. H. Lewis and one C. A. Person were defendants, for the sum of One Thousand Dollars and costs, and that thereafter the said J. E. Nave, E. H. Lewis and C. A. Person duly appealed to the supreme court of the state of Washington from the judgment aforesaid. That on the 9th day of October, 1906, the said appeal was by the said supreme court dismissed, and that the said judgment was at the time of the dismissal of the appeal a valid, legal and binding claim against the said J. E. Nave, E. H. Lewis and C. A. Person to which there was no further defense of any nature, and said judgment still remains a valid, legal and binding claim against said defendants J. E. Nave, E. H. Lewis and C. A. Person, unless it has been satisfied, settled and discharged by reason of the facts hereinafter set forth, and that no part thereof has been paid except the sum of \$290.95, as hereinafter set forth. That an execution has been issued by the clerk of the superior court of the state of Washington for said county upon the judgment aforesaid, and that said execution is now in the hands of the sheriff of Lincoln county for the satisfaction of said judgment.

“(5) That on the 21st day of November, 1906, at a regular meeting of the town council of the town of Wilbur, composed of the defendants L. Lewis, W. W. Howells, F. T.

Bump, W. J. Browne and James A. Muir, a resolution was introduced, seconded and passed by the said defendants to the effect that the said judgment should be satisfied and discharged upon the payment by the said defendants in the action wherein the judgment was entered of the costs and expenses therein incurred by the said town of Wilbur, aggregating the sum of \$290.95, and that the said town council and the defendants above named as members of the said council, then and there agreed with the said J. E. Nave, E. H. Lewis and C. A. Person to accept from them in full satisfaction of the said judgment as a full discharge of all their liability to the said town of Wilbur under said judgment, the sum above referred to and amounting to \$290.95 as aforesaid.

"(6) That the said J. E. Nave, E. H. Lewis and C. A. Person in pursuance of the resolution of the said town council of the said town of Wilbur, hereinbefore mentioned, paid to the treasurer of said town, and the treasurer accepted from the said defendants the sum of \$200, and the said defendants paid to the clerk of the above named court, the sum of \$90.75 in full satisfaction and discharge of the said judgment, and thereafter the treasurer of the said town council of the said town of Wilbur, paid the said sum of \$200 into the treasury of the said town of Wilbur, which was thereafter used and expended by said town in its usual and ordinary course of business, and that the said town council of the said town of Wilbur has instructed the sheriff of Lincoln county, Washington, not to proceed under the execution placed in his hands, referred to in paragraph 5 of the plaintiff's complaint herein.

"(7) That the plaintiff is a resident and taxpayer of the said town of Wilbur and pays annually to the said town of Wilbur large sums of money as taxes, and that the said settlement of the said judgment by the defendant as hereinbefore mentioned, will increase the taxes of this plaintiff and all other taxpayers of the said town of Wilbur to the extent of the reduction made on this judgment by said town council.

"(8) That the said J. E. Nave, E. H. Lewis and C. A. Person are the owners of property in Lincoln county, not exempt from execution of the value of at least twelve hundred dollars."

On the facts so stipulated the trial court held that the town council was without power to settle and satisfy the judg-

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ment on the terms recited in the resolution, and entered a decree as follows:

"It is ordered, adjudged and decreed that the defendants L. Lewis, W. W. Howell, F. T. Bump, W. J. Browne, James A. Muir and Peder Faldborg, and their successors and each and all of them be, and they are hereby perpetually enjoined from making any settlement with J. E. Nave, E. H. Lewis and C. A. Person upon the judgment and claim involved in this action for any sum whatsoever less than the full amount due to said town of Wilbur under said judgment; that they and their successors and each of them be perpetually enjoined from carrying out the agreement made with said Nave, Lewis and Person for the settlement of said judgment for less than is due thereon to the defendant, the town of Wilbur; that they and each of them and their successors in office be, and they are hereby perpetually enjoined and restrained from interfering in any manner whatsoever with the sheriff of Lincoln county in his efforts or attempts to proceed under the execution issued in said action; and that the said town of Wilbur, the town council of said town, the defendants above mentioned as councilmen and their successors in office be and they are hereby required and commanded to have an execution issued on the said judgment and to take all other necessary steps and proceedings to collect in full all sums due to said town of Wilbur under and by virtue of said judgment against J. E. Nave, E. H. Lewis and C. A. Person, and that they proceed immediately to collect for the said town of Wilbur and pay into the treasury of said town all sums due to said town in and by virtue of said judgment, to which defendant excepts and exception allowed."

From the judgment so entered the town and its officers appeal.

In this court the appellants make two principal contentions: first, that the court was without power to enjoin a transaction that the proofs showed had been then committed; and second, that a municipal corporation in this state has power and authority to compromise and satisfy a final judgment in its favor by taking a part for the whole even though the judgment debtor has property out of which the judgment can be made on execution.

The judgment is irregular. The acts which the appellants were enjoined from committing were performed at the time the judgment was entered, as fully and completely as the parties were capable of performing them, and the proper judgment would have been one vacating and setting aside the attempted compromise and settlement, and restraining the parties from carrying out the agreement. Such a judgment is within the powers of the superior court to enter when sitting as a court of equity. The powers of the court to grant injunctive relief are mandatory as well as prohibitive. It may by its mandate compel the undoing of those acts that have been illegally done, as well as it may by its prohibitive powers restrain the doing of illegal acts. Nor was it material in this case that the complaint asked for preventive relief rather than for a mandatory injunction vacating and setting aside what had been done. The plaintiff based his complaint for relief on the facts then in his possession. He did not know that the acts contemplated had been consummated. After the facts developed he was entitled to amend his complaint so as to make the pleadings and proofs correspond, had objection been then taken as to its sufficiency. No such objection having been taken, this court will treat it as sufficient.

The second contention is of more difficulty, but we think the court rightly held that the attempted settlement was beyond the powers of the town council. It is true the council has the exclusive management of the fiscal affairs of the town, and must be accorded a somewhat wide discretion as to the manner in which it will conduct such affairs, yet we think this power does not enable them to give up to third persons the actual property of the town. No doubt the town council may legally compromise doubtful or disputed claims where they act in good faith and with ordinary discretion, but they cannot under the guise of a compromise surrender up valuable rights or claims over which there is no longer room for a substantial controversy. Such an attempt is a gift rather than

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a settlement of a doubtful or disputed claim, and gifts to private individuals are beyond the powers of the town.

For the irregularity first mentioned, however, the judgment must be reversed, with instructions to modify it in the particulars mentioned. It will be so ordered.

HADLEY, C. J., CROW, MOUNT, and RUDKIN, JJ., concur.

[No. 7090. Decided May 14, 1908.]

HARRY RYNO, Respondent, v. ANTON SNIDER, Appellant.¹

TAXATION—JUDGMENT—VACATION—NOTICE TO TAX TITLE HOLDER. Notice of application to vacate a void tax foreclosure judgment must, after sale, be given to the purchaser holding the tax title, as the equitable assignee of the tax lien by virtue of the sale.

SAME—ACTION TO SET ASIDE TAX TITLE—TENDER OF TAX—NECESSITY—PAYMENT TO COUNTY TREASURER. Under Bal. Code, §§5678-5680, a suit to recover possession of lands sold to satisfy a tax cannot be commenced without first paying or tendering to the person in possession claiming under the tax title the amount of the tax with interest, penalties and costs for which the land was sold; and the fact that the judgment had been irregularly vacated and the taxes were thereupon paid to the county treasurer does not alter the case.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 7, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

Byers & Byers, for appellant.

A. C. MacDonald, for respondent.

CROW, J.—Action in ejectment brought by Harry Ryno against Anton Snider to recover possession of real estate in King county. After alleging that he had, on August 31, 1906, acquired the fee simple title, that he then became entitled to possession, and that the defendant, being then in

¹Reported in 95 Pac. 644.

possession, has ever since wrongfully withheld the same, the plaintiff further alleged:

"That the defendant herein claims title to the said real estate by reason of a tax title, which said tax title is void and worthless. That plaintiff's grantors have paid to the county treasurer of King county, Washington, the officer entitled by law to receive the same, the full amount of the taxes, interest and cost due to the said defendant by reason of the said tax title, and which are a lien on the said property."

A demurrer to the complaint having been overruled, and the issues having been completed by answer and reply, findings of fact, conclusions of law and judgment were made and entered in favor of the plaintiff, from which the defendant has appealed.

Appellant first contends that the trial court erred in overruling his demurrer to the complaint, and in denying his motion for a nonsuit. In his complaint the respondent alleged that the appellant claimed the land under a void tax title, but he failed to allege that, prior to the commencement of this action, he had paid or tendered to the purchaser at the tax sale, or to the appellant as his grantee, the taxes, penalty, interest and costs paid by them or either of them in acquiring their tax title, or that such payment had been refused.

On the trial there was no evidence showing or tending to show that any such payment had been made or tendered to the appellant or his predecessor in interest. The evidence admitted does show that one J. E. Brady had foreclosed a delinquent tax certificate on the land; that, under the foreclosure judgment, the county treasurer had sold the land to one H. B. Kennedy, to whom he executed and delivered a tax deed; that Kennedy afterwards conveyed to the appellant, Anton Snider; that the respondent claims the foreclosure proceedings were void; that more than two years after the execution and delivery of the tax deed to H. B. Kennedy and more than one year after appellant had acquired his title there-

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under, one James McNaught, named as owner in the original certificate of delinquency, not a party to the foreclosure proceedings, but who claimed that he still owned the land, upon notice to the attorney of J. E. Brady, and without notice to the appellant, Anton Snider, made in the foreclosure action an application for, and obtained, an order vacating the foreclosure decree; that neither the former attorney of the original plaintiff, J. E. Brady, nor any other person, appeared to resist such application; that McNaught then paid to the treasurer of King county the taxes, penalty, interest and costs included in the judgment, but that he made no tender thereof to Kennedy or appellant, and that the respondent by mesne conveyances thereafter deraigned title from McNaught. There is no evidence that appellant, at any time prior to the commencement of this action, had any knowledge actual or constructive that McNaught had made application for, and obtained, an order vacating the tax foreclosure and deed, or had made any payment to the treasurer.

The respondent contends that in cases of this character the county treasurer is the officer who under the law is entitled to receive delinquent taxes, penalty, interest, and costs when a foreclosure decree and sale have been vacated, and that it was only necessary to make payment to him. The allegations of the complaint as well as the evidence show that respondent knew the appellant was in possession of the land, claiming title to the same under the tax foreclosure, sale, and deed. Respondent's predecessor knew that the appellant's predecessor, Kennedy, could not have obtained his tax deed without payment of his bid at the tax sale, which in this instance was the full amount of the judgment. Such payment satisfied the judgment held by Brady, the original plaintiff, who thereafter ceased to have any interest in the taxes, the judgment, or the land. If the foreclosure and tax deed were actually void, the sale to Kennedy and his conveyance to appellant amounted to an equitable transfer of the tax lien to appellant, who thereby became the equitable assignee of Brady, and

notice of any application to vacate the judgment should have been served upon him, which was not done. *Smithson Land Co. v. Brautigam*, 16 Wash. 174, 47 Pac. 484; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625. Respondent's predecessor, McNaught, had notice of such equitable assignment of the tax lien to the appellant before he made application for the vacation of the judgment, as the tax deed to Kennedy and his deed to appellant were then of record. The satisfaction of the judgment by the tax sale was also notice that Brady had ceased to be a party in interest. Under such circumstances notice to Brady or his attorney was without validity, as it in no manner affected any rights of the appellant. The tax judgment, which was regular upon its face, recited that summons had been regularly and duly served upon the defendants, as the law in such cases required. The order of vacation having been entered without notice to appellant, was as to him void. The direct result of such a condition of the record is that the present action is now being prosecuted to obtain possession of land which has been sold for taxes and is held by appellant under an alleged tax title.

Bal. Code, § 5679 (P. C. § 8734), provides that in an action for the recovery of lands sold for taxes, against the person in possession, the complainant must state that all taxes, penalties, interest and costs, paid by the purchaser at tax sale, his assignees or grantees, have been fully paid or tendered, and payment refused. As above stated, this action has been brought to recover possession of land sold for taxes. It is prosecuted against appellant in possession as grantee of Kennedy, who as purchaser at the tax sale paid all taxes, penalty, interest and costs for which the tax judgment had been entered. Section 5679, *supra*, clearly contemplates that under such circumstances a tender shall be made to such purchaser, or his successor in interest, so that he may have an opportunity either to refuse the tender or to avoid litigation by accepting the same. It does not contemplate that he may be sub-

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jected to the costs and annoyance of an action for possession, in which the validity of his tax title will be questioned, without any previous tender having been made to him which he might at his election have accepted.

In *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171, in passing upon §§ 5678 to 5680 inclusive (P. C. §§ 8733-8735), this court said:

"By these provisions of the statute, a payment of the taxes, penalties, interest, and costs paid by a purchaser, or his assignor or grantor, for lands sold for taxes, or a tender of such payment, is made a condition precedent to the right to institute an action for the recovery of land so sold. . . . Where, as it appears here, the tax was a just charge against the land, and the sale is sought to be set aside because of fatalities in the proceedings leading up to the sale, it is an equitable rule, and within the power of the legislature to require the amount paid to the state to be *repaid or tendered to the purchaser* as a prerequisite to the right to maintain the action."

In *Moyer v. Foss*, 41 Wash. 130, 83 Pac. 12, we again said:

"Inasmuch, therefore, as it is not made to appear that the tax was void on its face, the appellants cannot maintain an action to recover the land sold to satisfy the tax without first *paying or tendering to the person claiming under the tax title* the amount of the tax with interest, penalties and costs, for which the land was sold."

Under the sections above mentioned, it would be proper to pay to the treasurer any delinquent taxes due to the county or to the holder of a certificate of delinquency not yet foreclosed, the same being a payment of delinquent taxes which had not yet been recovered by either of them through the medium of a tax foreclosure and sale. In this instance the judgment in favor of J. E. Brady had been fully satisfied, and neither he nor the county had any further claim. Any sum necessary to be paid under the statute, as a condition precedent to the prosecution of this action for a recovery of the land, should have been tendered to the holder of the title

under the tax deed, or some good and sufficient reason should have been alleged and shown for failing to make such tender. For want of any allegation of a tender to the appellant, the complaint failed to state a cause of action, and as its allegations were not afterwards aided or supplemented by proof, the appellant's motion for a nonsuit should have been granted.

The judgment is reversed, and the cause remanded with instructions to enter a nonsuit and dismiss the action.

HADLEY, C. J., MOUNT, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 6865. Decided May 15, 1908.]

E. H. CAMP *et al.*, *Appellants*, v. E. C. NEUFELDER *et al.*,
Respondents.¹

CONTRACTS — PERFORMANCE — OPTIONAL CONTRACT — APPROVAL OF ARCHITECT — ARBITRARY ACTION — EXTRAS. Where a building contract provides that the work must be performed to the satisfaction of the architect, he represents the owner as agent, and the contractor may treat the architect's arbitrary direction to use a certain class of material, as to which the contract gives the contractor an option, as a direction by the owner to disregard the contract, for which work extra compensation may be recovered, if extra costs result to the contractor therefrom.

SAME — REMEDIES OF CONTRACTOR — LIENS FOR EXTRAS — MECHANICS' LIENS. In such a case, it is not a valid objection to a claim for a lien for the extra compensation that the same was waived by complying with the direction of the architect, as the contractor may pursue either the remedy of a lien for the extra work, or refuse to comply with the direction and recover on the contract.

SAME — CONSTRUCTION OF CONTRACT. Where a building contract provides that certain sidewalk lights shall be "the W. B. J. make, or equal" it gives the contractor an option; and the arbitrary action of the architect in insisting that no other make was equal, and refusing to allow an "equal" make to be used, cannot be justified by a clause providing that the contract shall be performed to the satisfaction of the architect.

MOUNT and RUDKIN, JJ., dissent.

¹Reported in 95 Pac. 640.

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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 7, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Reversed.

Carkeek & McDonald, for appellants.

Roberts & Hulbert (*Kerr & McCord*, of counsel), for respondents.

FULLERTON, J.—On February 15, 1905, the respondent Neufelder entered into a contract with the respondent F. McLellan & Co., by the terms of which the latter agreed to furnish the necessary materials and reconstruct and remodel, according to plans and specifications agreed upon, a certain building owned by the former, situated in the city of Seattle. F. McLellan & Co. sublet the furnishing and putting in place of a part of the required materials to the appellants, Camp and TeRoller, and among the enumerated articles to be furnished and put in place by them were certain prism lights. These were described in the specifications in the following language:

"All sidewalk lights to be 3x3 inches reflecting prism lens set in cement; all frames to be what is known as bar-lock construction. All joints must be made and guaranteed water tight. These lights shall be of the W. B. Jackson make, or equal, and shall be constructed to carry a safe load of 350 lbs. per sq. ft."

The contract provided that the work must be performed to the satisfaction of the architect named in the contract, who had the right to approve or reject any and all work. When the appellants in the course of their work reached the sidewalk, they informed the architect that they had several prism lights equal to the W. B. Jackson light which they wished to submit to the judgment of the architect that a selection might be made therefrom. The architect refused to examine

or consider them, stating in effect that there were no prism lights equal to the W. B. Jackson light, and that no other or different light would be accepted or approved by him. The appellants thereupon put in the W. B. Jackson lights, at a cost, as they claim, of some six hundred dollars more than lights equal to the W. B. Jackson lights would have cost them, and subsequently claimed this amount as an extra, filing a lien upon the building to secure the payment of the same. This action was instituted to foreclose the lien so filed. At the trial the court refused to allow the appellants to show that there are lights equal to the W. B. Jackson light that could have been procured and put in by them at a saving to themselves; holding that since the lights were actually put in and were lights permitted by the contract, no right of action accrued to them to recover the extra costs. Judgment was entered accordingly, from which this appeal is taken.

The respondents present the case in this court on somewhat different grounds from that taken by the trial judge. Although they do not entirely abandon the position taken by him, they contend, (1) that a proper construction of the specifications calls for the installation of the W. B. Jackson lights if they are procurable, and the substitution of others only in the case that these lights cannot be obtained; and (2) that since the contractors were bound to complete the building to the satisfaction of the architect, his decision on the question of the character of the lights to be put in was final, and the contractors for that reason have no cause of complaint.

But it has seemed to us that neither the reason given by the trial judge nor the reasons suggested by the respondents justify the judgment entered. The mere fact that the contractors put in the W. B. Jackson lights at the instigation of the architect does not estop them from claiming of the owner the loss sustained thereby. The architect, while he stood in the relation of umpire in some of his aspects under the contract, stood in the relation of agent for the owner in

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this instance. That is to say, he was the person selected by the owner to determine the character of the material that should go into the work, and in this respect was the owner's agent, and in the performance of this duty was as much bound to act fairly and impartially as the owner would himself be bound had there been no selection of an intermediary. The contractor, therefore, had the right to treat the direction given by the architect as a direction given by the owner, and can recover any loss suffered because thereof if the direction was so far arbitrary as to be without the terms of the contract. No doubt the contractors could have very properly put in lights equal to the W. B. Jackson lights, and recovered on the contract by showing that the architect's objections thereto were arbitrary and not in the exercise of an independent and honest judgment, but this was not their only remedy; they were justified in obeying the architect's instructions, and in seeking to recover the loss sustained thereby.

Nor can we agree that the respondents' interpretation of this clause in the specifications is correct. Manifestly the appellants were given the option either to put in the W. B. Jackson lights or lights equal to the W. B. Jackson lights. And this being so, the installation of either would be a compliance with the contract.

The last objection made by the respondents, while of more moment, seems to us also to be without foundation. While it is true that the contractors were bound to perform to the satisfaction of the architect, yet it was equally true that they had a right to demand that he exercise an independent and honest judgment, and that he should not arbitrarily refuse to consider or determine matters submitted to his judgment. If the contractors did in fact produce lights equal to the W. B. Jackson light they had the right not only to install them but the right to have the architect's approval of them before they were installed, and it was the architect's duty to give them the benefit of his honest judgment in passing upon the character of the lights produced. If he did not do this, but arbitrarily re-

fused to consider or pass upon them, and arbitrarily directed that the W. B. Jackson lights be put in, his conduct was so far a fraud upon the rights of the contractors as to entitle them to submit to the courts the question whether or not the lights they desired to substitute were lights proper to be installed under the contract, and whether or not they have suffered loss by the architect's action.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., CROW, ROOT, and DUNBAR, J.J., concur.

MOUNT, J. (dissenting)—The appellants in this case did what they agreed to do for a fixed price. They did no more. But they seek now to claim a greater price and to foreclose a lien for the excess, because they could have furnished another make of prism light at a cheaper price. The mere statement of the proposition ought to be sufficient to affirm the judgment. But assuming that the appellants had a right under the contract to substitute some other light for the "Jackson light," one equal to that light, the contract does not provide that the appellants shall decide upon the substitute, but expressly provides that the work shall "be performed to the satisfaction of the architect." Whether the architect is the agent of the owner makes no difference here. If the agreement had provided that the work must be performed to the satisfaction of the owner, he would then decide which light was satisfactory, and he might do so arbitrarily as the architect did, so long as he did so in good faith. *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373; 24 Am. & Eng. Ency. Law (2d ed.), p. 1236. It is clear to my mind that the respondents desired a certain kind of building with certain named sidewalk light, "W. B. Jackson make, or equal," and that the contract reserved the right to the architect to be satisfied when some light other than the particular one specified was offered to be substituted. The contract was entered into, of course, upon the basis of the cost of the "Jackson make,"

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and the respondents had a right to that particular light, or to be satisfied with some other make.

The judgment, in my opinion, should be affirmed. I therefore dissent.

RUDKIN, J., concurs with MOUNT, J.

[No. 7109. Decided May 20, 1908.]

WILLIAM H. STUBBS, Respondent, v. CONTINENTAL TIMBER COMPANY, Appellant.¹

PROCESS—SUMMONS BY PUBLICATION—FORM—SUBSTANTIAL COMPLIANCE. A summons for publication requiring the defendant to appear within sixty days after a specified date, is "substantially" in the form prescribed by Bal. Code, § 4878, which requires appearance to be within "sixty days after the date of the first publication of this summons, to wit, within sixty days after....day of.....;" the omission of reference to the first publication being immaterial where the date thereof itself is given (MOUNT and CROW, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Linn, J., entered November 15, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

H. H. Field and Frank H. Owings, for appellant.

Revelle, Revelle & Revelle, for respondent.

FULLERTON, J.—In October 1904, one George P. Rossman began an action in the superior court of King county against the respondent and others to recover upon an account for legal services rendered a brother of the respondent. At the time of commencing the action, he sued out a writ of attachment, and caused the same to be levied on certain real estate belonging to the respondent, situated in Thurston

¹Reported in 95 Pac. 1011.

county. Personal service could not be had upon the respondent, and the following summons was served by publication:

"The State of Washington to William H. Stubbs, defendant: You are hereby summoned to appear within sixty days after the 16th day of December, 1904, and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned, attorneys for the plaintiff, at their office below stated, and in case of failure on your part so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court. That plaintiff's cause of action against you is for services rendered by him at the request of you and your codefendants in the defending of your brother, Fred R. Stubbs at Tacoma, Washington, on the 12th day of September, 1904, and for moneys paid out by the plaintiff in said case at your request. The total amount claimed by the plaintiff is \$378."

The respondent made default, and judgment was taken against him for the sum recited to be due in the summons, under which judgment the attached real property was sold by the sheriff pursuant to statute. The appellant is the owner by mesne conveyances of the title so acquired. The respondent conceived that the proceedings leading up to the sale were void, having the effect only of casting a cloud upon its title, and he began the present action to remove the cloud, and otherwise quiet his title to the premises. The trial judge held that the judgment under which the property was sold was void for want of the service of a sufficient summons, and entered a judgment in accordance with the prayer of the complaint, being the judgment from which this appeal is taken.

There is but one question presented by the record, namely, the sufficiency of the published summons. The statute prescribing what the published summons shall contain, provides, among other things, that it "shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons." And the form

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given, to which the summons as published must substantially comply, is as follows:

"In the superior court of the state of Washington for the county of _____.

_____, Plaintiff,

vs.

No.

_____, Defendant.

"The state of Washington to the said (naming the defendant or defendants to be served by publication):

"You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the _____ day of _____, 1_____, and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff _____, at his (or their) office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court. (Insert here a brief statement of the object of the action.)

_____,
"Plaintiff's Attorneys.

"P. O. address, _____, county _____, Washington." Bal. Code, § 4878 (P. C. § 336).

The published summons, it will be noticed, while sufficiently regular in other respects, omits the words "after the date of the first publication of this summons, to wit," which precede the actual date given as prescribed in the form, and it is this omission that is thought to render the summons void. We are of the opinion, however, that the omission is not fatal to the judgment. No doubt it was the purpose of the framers of the statute to provide a summons so definitely worded that the defendant summoned would know with certainty the time within which no default could be entered against him, but the wording of the statute makes it clear that they did not intend to prescribe a particular form of words with which the idea should be expressed to the exclusion of all others. The requirement is that the summons shall be substantially in the

form given, not that it shall be a literal transcript of that form. The summons published is as definite as the prescribed form in fixing the time within which the defendant must appear. It summons the defendant to appear within sixty days from a given date, and this is all that form given does or can do. In point of definiteness it adds nothing to the summons to insert preceding the date the words, "after the date of the first publication of this summons, to wit." These words but describe an event which may or may not have happened on the date given. To ascertain that fact the defendant must resort to the initial copy of the paper in which the summons is being published, or he must inspect the proofs of publication after they are returned and filed in court. The same sources of information are equally open to him whether the words omitted here are or are not included in the summons as published. The insertion of the words, therefore, cannot instruct nor can their omission mislead the defendant, and, since only a substantial compliance with the statute is required, it would seem to be sacrificing the substance to the shadow to hold that the omission of the words is fatal to a judgment entered thereon.

The cases cited from this court to sustain the trial court, viz., *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Young v. Droz*, 38 Wash. 648, 80 Pac. 810; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, and *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606, will be found on inspection to have no bearing on the question here suggested, and we refrain from commenting upon them.

The judgment is reversed, and remanded with instructions to enter a judgment in favor of the defendant to the effect that the plaintiff take nothing by his action.

HADLEY, C. J., RUDKIN, and DUNBAR, JJ., concur.

MOUNT, J. (dissenting)—The conclusion reached by the majority upon the point discussed is probably correct, but

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the statute [Bal. Code, § 4878 (P. C. § 336)], requires a published summons to "contain a brief statement of the object of the action." The object of the action in *Rossmann v. Stubbs* was to obtain a judgment for money and also to enforce such judgment against certain attached real estate. There is no intimation in the summons that the action is for anything more than to recover a personal judgment of \$378. Upon the face of the summons that action was *in personam*, upon which no valid judgment could be entered. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Cosh-Murray Co. v. Tuttich*, 10 Wash. 449, 38 Pac. 1134. In order to be effective as a notice the published summons should have stated the object which would have shown jurisdiction in the court. The summons as published was not only insufficient under the statute, but was misleading. It is true this particular question is not made in the briefs, but it is apparent on the face of the record. The judgment, in my opinion, should be affirmed. I therefore dissent.

CROW, J., concurs with MOUNT, J.

[No. 7187. Decided May 23, 1908.]

THE STATE OF WASHINGTON, *Appellant*, v. GLEN PARAMETER,
Respondent.¹

CRIMINAL LAW—DISMISSAL FOR FAILURE TO PROSECUTE—APPEAL—STATUTES—CONSTRUCTION. Where the accused, convicted in a police court, has on appeal been discharged from custody on giving bond to appear and prosecute his appeal, he is not entitled to a dismissal of the charge because more than sixty days elapsed without trial after the taking of the appeal, where he made no demand for trial, under Bal. Code, § 6911, requiring the dismissal of a prosecution if the accused is not brought to trial within sixty days after the information is filed if the trial was not postponed on his application; since he was accorded a speedy trial in the police court, and was bound to demand trial on appeal for his own benefit, under Bal. Code, § 6763, requiring him to appear and prosecute the appeal.

¹Reported in 95 Pac. 1012.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 28, 1907, in favor of the defendant, dismissing a criminal charge pending an appeal from a judgment of conviction. Reversed.

Marquis & Shields and *R. E. Taggart*, for appellant.
J. C. Cross (*A. Emerson Cross*, of counsel), for respondent.

CROW, J.—This action, which is a prosecution of Glen Parmeter for the violation of an ordinance of the city of Aberdeen, was originally commenced in the city police court where, upon trial before a jury, the defendant was convicted and fined. On July 18, 1907, he appealed to the superior court for Chehalis county, and upon filing an appeal bond was discharged from custody. On September 21, 1907, the defendant served and filed in the superior court an application for the dismissal of the action, on the ground that more than sixty days had elapsed since the taking of his appeal, and that the trial of the cause had not been postponed on his application. This motion being sustained, judgment was entered, discharging the defendant, exonerating the sureties on his appeal bond, and taxing the costs against the city of Aberdeen. The plaintiff has appealed.

This action, prosecuted for the violation of a city ordinance, although conducted in the name of the state of Washington, was commenced in the police court of the city of Aberdeen, which had original jurisdiction. In that court the respondent was promptly tried and convicted. He appealed, and now contends that he was entitled to be discharged and to a dismissal of the action by the superior court under Bal. Code, § 6911 (P. C. § 1531), reading as follows:

"If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found or the information filed, the court must order it to be dismissed, unless good cause to the contrary be shown."

The bill of rights of the state constitution, art. 1, § 22, provides that, in criminal prosecutions, the accused shall have the right to a speedy trial; and Bal. Code, § 6911, *supra*, was enacted for the purpose of enforcing such right. The respondent has already been awarded a speedy trial before a jury in the court of original jurisdiction. His appeal removed the cause to the superior court, and was taken for the sole purpose of obtaining another trial and securing his discharge, if acquitted. Under these circumstances he should at least have demanded such trial in the superior court before seeking a dismissal and discharge under the statute. Bal. Code, § 912 (P. C. § 3467), provides that appeals from the police court to the superior court may be taken as an appeal is taken from a justice's court; and Bal. Code, §§ 6763, 6764 (P. C. §§ 3082, 3083), define the method of taking such appeals in criminal actions. The former section by express terms provides that the bond to be given by the appellant shall be conditioned that he will appear in the superior court and there *prosecute his appeal*; while the latter directs that, if he shall fail to enter and prosecute his appeal, he shall be defaulted of his recognizance and the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted in that court. In view of these sections, it is not necessary for us to determine whether the respondent, after conviction in the police court, could be discharged for unnecessary delay of proceedings and the want of a speedy trial, after he had on appeal demanded trial in the superior court, it not being shown that he ever made any such demand. On the record before us, we are of the opinion that he was not entitled to a discharge, for the reason that he had been awarded a speedy trial in the police court, that the appeal was taken by him after such trial for his own benefit, and that thereafter he should have diligently prosecuted the same by demanding the new trial to which he was entitled in the superior court. Having failed to do this, he

was in no position to invoke the statute in his behalf, and demand his discharge and dismissal of the action.

He contends, however, that the superior court in making the order of dismissal properly relied on the case of *In re Murphy*, 7 Wash. 257, 34 Pac. 884, as holding that the statute applied when a new trial had been granted after conviction, and that the sixty days should begin to run from the date of the order granting the new trial. We do not regard that holding as applicable to the facts now before us. In that case the superior court had original jurisdiction, and granted the new trial. Here it obtained jurisdiction by appeal. The respondent had been convicted in the police court. No order awarding him a new trial had been made in that or any other court. He was entitled to trial in the superior court only by reason of his appeal if diligently prosecuted. Failure upon his part to so prosecute the same would authorize the superior court to award sentence against him without further trial, in like manner as if he had been there convicted.

The judgment is reversed, and the cause remanded with instructions to reinstate the action and proceed with the trial.

HADLEY, C. J., MOUNT, ROOT, FULLERTON, and RUDKIN, JJ., concur.

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Opinion Per RUDKIN, J.

[No. 7218. Decided May 25, 1908.]

GORDON MACKAY, Appellant, v. J. R. DEVER, Respondent.¹

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY. An appeal from a judgment dismissing an action to enjoin the holding of a primary election will be dismissed because of cessation of controversy, where, before the hearing of the appeal, the time for holding the election has expired, and the election has been held or never can be held.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered October 29, 1907, dismissing an action to enjoin a city clerk from incurring expense at a primary election, after a trial on the merits before the court. Appeal dismissed.

Gordon Mackay, pro se.

George R. Bigelow and William W. Manier (The Attorney General and I. B. Knickerbocker, Assistant, of counsel), for respondent.

RUDKIN, J.—This action was instituted by the plaintiff, as a taxpayer of the city of Olympia, to restrain the city clerk from incurring expense at a primary election to be held on the 19th day of November, 1907, under the act of March 15, 1907, entitled: "An act relating to, regulating and providing for the nomination of candidates for public office in the state of Washington and providing penalties for the violation thereof, and declaring an emergency" (Laws 1907, p. 457), for the reason that said act is unconstitutional and void. From a judgment denying a temporary injunction and dismissing the action, the present appeal is prosecuted.

The election against which the injunction is sought has already been held, or can never be held; the expense of the election has been incurred, or will not be incurred, and this court cannot restrain or undo what has already been done. To all

¹Reported in 95 Pac. 860.

passed; and, before the entry of the appeal in this court, the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. 21 Statutes of South Carolina, pp. 802, 803. The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. The lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the constitution and public laws of each state of the Union. . . . Taking judicial notice of the constitution and laws of the state, this court must take judicial notice of the days of public general elections of members of the legislature, or of a convention to revise the fundamental law of the state, as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect. . . . It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the circuit court, no relief within the scope of the bill could now be granted."

It has been suggested that the question is a recurring one and will arise again, but in the language of the court of appeals of New York: "The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case in its present situation presents."

The appeal must therefore be dismissed, and it is so ordered.

HADLEY, C. J., Root, FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

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Opinion Per MOUNT, J.

[No. 7256. Decided May 25, 1908.]

JAMES O'CONNOR *et al.*, *Respondents*, v. H. A. BURNHAM,
*Appellant.*¹

LOGS AND LOGGING—LIENS—FINISHED PRODUCT. Contractors getting out logs, at so much per thousand feet, for immediate manufacture into lumber by the owner, are entitled to a lien upon the finished product, under Bal. Code, § 5931, giving a lien for services rendered in the manufacture of logs into lumber, and are not confined to a lien upon the logs given by Bal. Code, § 5930.

SAME—ELOIGNMENT. Where the logs were at all times owned by one who manufactured them into lumber, the owner cannot defeat a lien on the logs by claiming that he was only liable as an eloignier, where the statute gave a lien on the finished product to any one rendering services on the logs.

SAME—PERFORMANCE OF CONTRACT. One claiming a lien on logs under a contract to cut certain timber at \$4 per thousand, payable monthly as delivered, is justified in ceasing to work upon the owner's refusal to make payments agreed upon.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered October 28, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose an employee's lien. Affirmed.

Troy & Falknor, for appellant, cited: 25 Cyc. 1585; *Littlefield v. Morrill*, 97 Me. 505, 54 Atl. 1109, 94 Am. St. 513; *Graham v. Gardner*, 45 Wash. 648, 89 Pac. 171; *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Campbell v. Sterling Mfg. Co.*, 11 Wash. 204, 39 Pac. 451; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966.

Chas. D. King and *Byron Millett*, for respondents.

MOUNT, J.—This action was brought to foreclose a lien upon certain lumber. At a trial the court found in favor of the plaintiffs, and entered a decree foreclosing the lien for

¹Reported in 95 Pac. 1013.

the amount, \$241.40, besides attorney's fees and costs. The defendant H. A. Burnham has appealed.

The facts are in substance that, on October 19, 1906, the appellant was the owner of certain standing timber in Thurston county, and operating a sawmill on the Des Chutes river near the standing timber. On that day the appellant employed the respondents to cut a certain portion of that timber into sawlogs and place the logs in the river. The employment was oral. The agreement was, that the respondents should furnish men and teams and place the logs in the river, at \$4 per thousand feet board measure; that the appellant should pay for the work on the 15th of each month, for the logs delivered in the river during the previous month. The logs were floated down to the mill and immediately cut into lumber. Between the 19th day of October, 1906, and the 19th day of December of the same year, the respondents placed in the river 296,584 feet of logs, upon which the appellant paid the respondents \$940, leaving the balance unpaid. About the 15th of December, some dispute arose as to the measurement of the logs and the amount claimed to be due, and appellant refused to pay for certain logs theretofore delivered into the river until certain timber could be cut. Respondents thereupon ceased to work and filed the lien notice which is now being foreclosed.

It is claimed by the appellant that the respondents are contractors and are, therefore, not entitled to claim of lien under Bal. Code, § 5981 (P. C. § 6083), upon lumber manufactured from the logs; that respondents were entitled to claim a lien only upon the logs, under Bal. Code, § 5980 (P. C. § 6082). This question was directly passed upon in *Robins v. Paulson*, 30 Wash. 459, 70 Pac. 1113, where we held that persons cutting the logs in the woods for the manufacture of lumber were entitled to a lien upon the finished product at the mill. In the case of *Graham v. Gardner*, 45 Wash. 648, 89 Pac. 171, we held that persons employed in the woods cutting logs at a fixed price per thousand were not

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entitled to a lien upon the mill where the logs were manufactured into lumber. Some things were said in that case which may be at variance with the holdings in *Robins v. Paulson, supra*, and cases therein cited, but it was not our intention to overrule those cases.

Appellant also argues that he must be held as an eloigner, if he may be held at all; but what we have said above disposes of this contention. There is no element of eloignment in this case. The respondents cut and delivered the logs to the appellant, who manufactured them into lumber at the mill. The logs were the property of the appellant at all times. The appellant simply hired the respondents to go into the timber and cut and deliver the logs to the mill, there to be manufactured into lumber immediately.

It is next claimed that the respondents did not perform the contract by keeping appellant supplied with logs sufficient to keep the mill going, and that appellant was damaged thereby. The evidence is in direct conflict as to whether the respondents agreed to cut sufficient logs to keep the mill running; and we are of the opinion that the evidence is insufficient upon this point to base a finding of damages upon. The evidence shows that the capacity of the mill was much greater than the ability of respondents to supply logs. No complaint was made that logs were not supplied fast enough until about the time respondent ceased to work. We are also of the opinion that the respondents were justified in ceasing to work, by reason of the refusal of appellant to make the payments as agreed upon.

We find no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., ROOT, CROW, RUDKIN, FULLERTON, and DUNBAR, JJ., concur.

[No. 6900. Decided May 26, 1908.]

FOSS INVESTMENT COMPANY, Plaintiff and Appellant, v.
EMMA J. ATER, Respondent, O. E. DARLING,
*Intervener and Appellant.*¹

BROKERS—AUTHORITY—AGENT FOR OWNER—ACTING IN OWN INTEREST—VENDOR AND PURCHASER—CONTRACT. A real estate broker acting pursuant to authority initiated by his letter to the owner stating "I can sell your lot," and asking the best price, is a selling agent only, without authority to make a binding contract of sale, upon receipt of a letter from the owner stating that she will take a certain sum net, where the owner had no notice that the broker was attempting to purchase in his own interest.

SAME. A sale of real estate is voidable at the option of the owner, where the broker was acting as selling agent for a nonresident owner, and knew that the property was rapidly increasing in value, but failed to communicate that fact to the owner, and made a sale for his own practical benefit to a corporation controlled and owned by him, without the knowledge of the owner that the agent was interested in the sale.

VENDOR AND PURCHASER—CONTRACT—SPECIFIC PERFORMANCE. No binding contract of sale that can be specifically enforced against the owner is shown by a nonresident owner's letter offering to take \$800 net, and a telegram from the agent "offer accepted" without tender of the money, especially where the owner replied by wire that she was awaiting guarantee of the cash; and deposit of the cash in a bank with request for telegraphic acceptance of such deposit, is not sufficient to bind the sale where the owner never accepted such deposit, but, upon hearing thereof, answered that the lot was sold.

SAME—BROKERS—AUTHORITY TO SELL. A nonresident owner of real estate, who had listed her property for sale with a Philadelphia broker, is not bound by a contract of sale entered into by a local broker at Tacoma, Washington, for the price of \$800, subject to the owner's approval, where the local broker undertook to obtain the owner's consent to the sale by negotiations through the Philadelphia broker, who represented the deal as an offer of \$700 net to the owner, which she accepted, the real contract never having been submitted to her, and the agents never having been given any authority to make a binding contract of sale.

¹Reported in 95 Pac. 1017.

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SAME—RATIFICATION. In such a case, the execution of a blank deed to close the deal would not amount to a ratification by the owner of the sale by the local brokers, where the deed was not sent to the local broker, and the owner never knew of his offer of \$800 for which the deed was secured.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered August 1, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to enforce the specific performance of a contract to sell real estate. Affirmed.

Boyle, Warburton, Quick & Brockway, for plaintiff.

Fogg & Fogg, for defendant.

H. G. & Dix H. Rowland, for intervener.

CROW, J.—Action by the Foss Investment Company, a corporation, against Emma J. Ater, to enforce specific performance of a contract by which, it is alleged, the defendant agreed to sell certain real estate to the plaintiff. O. E. Darling, by complaint in intervention, also sought to enforce the specific performance of a separate and distinct contract by which, he alleged, the defendant covenanted to sell the same real estate to him. The defendant denied the making of either contract. Pending the action, the real estate was by agreement sold, all the parties stipulating that its proceeds should be awarded to the one succeeding in this litigation. From a judgment in favor of the defendant, the plaintiff and intervener have appealed.

There being two appellants, we will in this opinion allude to the respective parties as plaintiff, defendant, and intervener. The alleged contracts severally pleaded by the plaintiff and intervener being distinct and separate, the trial judge heard and determined the issues as to each of them separately, and we will consider the appeals in the same manner. On the issues arising between the plaintiff, Foss In-

vestment Company, and the defendant, Emma J. Ater, findings were made and entered from which it appears, that the plaintiff, Foss Investment Company, was and is a corporation; that Louis Foss & Co. was and is a copartnership firm consisting of Louis Foss and W. D. E. Anderson, each with a one-half interest, engaged in the real estate business in the city of Tacoma; that in October and November, 1905, the defendant, Emma J. Ater, then residing in New York City, was the owner of lot 5, in block 7522, Tacoma Land Company's Addition to Tacoma, Washington; that in October, 1905, Louis Foss wrote Emma J. Ater, on a letter-head of Louis Foss & Co., as follows:

"Emma J. Ater:

"Dear Madam—I can sell your lot on No. 5, block 7522. Please give me your best price and I can dispose of it if the price is reasonable. Yours truly, Louis Foss;"

that the defendant answered as follows:

"Louis Foss & Co., Tacoma, Wash.

"Gentlemen—Your favor referring to sale of lot 5, block 7522 is just received. I will take \$800.00 net for the lot. I shall be glad to hear from you as soon as possible, as there are now prospective buyers. Very truly,
"Nov. 3rd, 1905. Emma J. Ater;"

that on November 10, 1905, the defendant received at her residence in New York City the following telegram:

"Emma J. Ater, No. 32 West 38th St., New York City.

"Offer accepted. Lot sold. Send abstract. Will forward deed for your signature. Answer. Louis Foss & Co;"

that in response thereto she sent, on or about Nov. 10, 1905, the following telegram:

"Louis Foss & Co., 320 Washington Bldg., Tacoma, Wn.

"Awaiting guarantee eight hundred cash net. I will send abstract. Emma J. Ater;"

that afterwards, on the evening of November 11, 1905, the defendant, Emma J. Ater, received at her residence in New

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York City a telegram from the Pacific National Bank of Tacoma, reading as follows:

“John has deposited \$800, eight hundred dollars to be paid you on examination of title. Send abstract to us. Wire acceptance;”

that at the time the telegram was sent it read “Foss” instead of “John;” that the words “Wire acceptance” were added to the telegram by the bank at the direction of Louis Foss, for the purpose of ascertaining whether the deposit in the Pacific National Bank of Tacoma was acceptable to the defendant Ater; that the defendant Emma J. Ater immediately answered the last telegram as follows: “The lot is sold;” that at the time the bank sent its telegram to Emma J. Ater, it also wrote her as follows:

“Emma J. Ater,
“32 West 38th Street, New York City.

“Dear Madam—We enclose herewith confirmation of telegram sent you today, and beg to advise you, we are holding \$800 to be paid over to you on the examination and satisfactory title to the property referred to in your telegram to Mr. Foss. Upon examination of this title, and if found clear, we will forward deed for you to sign, in care of the Chase National Bank of New York City, who will notify you to call and sign the deed, and they will pay you the money. Kindly forward abstract at your earliest convenience;”

that thereupon Louis Foss sent to Emma J. Ater a deed to be executed by her, and so notified the bank; whereupon the cashier of the bank wrote her as follows:

“Emma G. Ater,
“32 West 38th Street, New York City.

“Dear Madam—Mr. Foss was in this morning and informed me he had sent you a blank warranty deed. This is not in accordance with the arrangement made by the bank, and when we have the abstract examined and find that the property is clear and you can give a good deed, we will forward deed, as per our letter of yesterday, to the Chase National Bank of New York City, where the money will be

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paid to you upon your signing and acknowledging a satisfactory deed;"

that both of the above letters were received by the defendant in due course of mail about five days after their date; that on November 12, 1905, the defendant received from Louis Foss & Co. a telegram as follows:

"Property sold to Foss Investment Co. Suit will be commenced unless you execute deed. Answer;"

which she immediately answered by telegram as follows: "Deed executed before guaranty received;" that the defendant Emma J. Ater never had any oral communication with Louis Foss, or Louis Foss & Co., or the Foss Investment Company, relative to the lot, nor did she communicate with them in any manner, except by letter or telegram; that she had no knowledge, notice, or information that Louis Foss or Louis Foss & Co. had attempted or pretended to sell, or enter into any contract of sale for, the lot, except as shown by the above letters and telegrams; that she never heard of the Foss Investment Company until she received the telegram of November 12, 1905, threatening suit, above set forth; that she had no notice, knowledge, or information as to who were the stockholders in the Foss Investment Company, or as to the relations existing between the company and Louis Foss and Louis Foss & Co.; that she never authorized Louis Foss nor said Louis Foss & Co. to make any contract of sale; that she did not intend or contemplate that they or either of them would attempt to make a contract of sale, but that they would at most find a purchaser ready, able, and willing to take the lot at the price of \$800 cash net to her; that she did not give Louis Foss or Louis Foss & Co. any exclusive agency to sell; that at all times during the communications between Louis Foss and Louis Foss & Co. and the defendant above named, Louis Foss was a member of the firm of Louis Foss & Co.; was president and manager of the plaintiff corporation Foss Investment Company; that he held nine hundred and ninety-

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eight of the one thousand shares of the capital stock of the Foss Investment Company; that his wife and daughter each held one of the two remaining shares; that Louis Foss, Louis Foss & Co., and Foss Investment Company, at all times during the months of October and November, 1905, had their place of business in the same office; that they were all managed by Louis Foss; that the deposit of \$800 with the Pacific National Bank of Tacoma consisted of two personal checks made by Louis Foss; that any profit which might have resulted from the purchase of the lot by the plaintiff would have inured to the benefit of Louis Foss, his wife and daughter; that all arrangements and negotiations between Louis Foss, Louis Foss & Co., and the Foss Investment Company, relative to the transaction, were carried on by Louis Foss personally, acting in his several capacities as Louis Foss, as a member of the firm of Louis Foss & Co., and as president and manager of the Foss Investment Company; that on or about June 11, 1906, all the parties to this action made and entered into a stipulation for the sale of the lot for the sum of \$5,000, the proceeds to be deposited in court to abide the result of this action, and to be paid to the successful party, and that the lot was then sold for that price.

The first question with which we are met is whether these findings are sustained by the evidence. As to the sending and receipt of the telegrams and letters above mentioned there is no dispute. Although much conflict arose upon other questions of fact, we have concluded, after a careful examination of all the evidence, that the findings made by the trial judge are supported by its clear preponderance. One of the controlling issues between the plaintiff and defendant is whether Louis Foss, in initiating and conducting the foregoing correspondence with Mrs. Ater, was acting as her selling agent or as purchasing agent for the plaintiff corporation, Foss Investment Company. The trial court, in its conclusions of law, held that he was selling agent for the defendant; that, while he was acting as her agent, he was, without her knowl-

edge or consent, also acting for himself personally, for the partnership firm of Louis Foss & Co., of which he was a member, and for the plaintiff Foss Investment Company, and that the defendant Emma J. Ater was not bound by his acts in making the attempted sale. Upon the entire record we feel compelled to sustain this holding. Our view is that the first letter written to the defendant by Louis Foss on October 26, 1905, in which he said, "I can sell your lot," was well calculated to convey to her mind the idea that he only intended to act as her selling agent in finding a purchaser, provided she quoted a reasonable price. He did not advise her that he himself was an intended buyer, nor did he intimate to her that he was acting for himself or any other person in purchasing the lot. The correspondence must have indicated to the defendant that he was acting as her selling agent only, and we hold that as to her he was such agent. This being the fact, he had authority to find a purchaser ready, willing, and able to buy at the defendant's price and upon her terms for cash, but did not have authority to execute to such proposed purchaser a contract of sale that would be binding upon her. *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471.

Louis Foss was selling agent for the defendant, who as his principal was entitled to the full benefit of his knowledge, services, and ability. He knew the property was rapidly advancing in market value, but failed to communicate such fact to Mrs. Ater, she being a nonresident and in ignorance of the true situation. About seven months later the lot sold for \$5,000, an advance of five hundred and twenty-five per cent. The plaintiff is now endeavoring to obtain this advance which would inure to the practical benefit of Louis Foss, the agent. He, being the selling agent for Mrs. Ater, and at the same time agent for the alleged purchaser, as president and manager of the plaintiff corporation which he substantially owned and controlled, and having failed to disclose such relations to Mrs. Ater, the alleged contract was at her option voidable. An agent to sell cannot himself become the pur-

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chaser directly or indirectly, without the knowledge and consent of his principal. Louis Foss, defendant's agent, was so closely identified with, and in such complete control of the plaintiff corporation, that practically he would have become the sole beneficiary of all profits and benefits that might accrue to the plaintiff as purchaser.

It is not contended, nor is it shown, that Mrs. Ater ever authorized Louis Foss to execute any contract of sale, and we fail to see how it can be successfully contended that any contract was entered into between the plaintiff and defendant which can be specifically enforced in this action. The negotiations, which were made exclusively through the medium of letters and telegrams, fall short of a completed, enforceable contract. In response to the first letter written by Mr. Foss, the defendant advised him that her selling price would be \$800 net, and thereupon he wired her: "Offer accepted. Lot sold. Send abstract. Will forward deed for your signature." This answering wire did not advise the defendant who it was that had accepted her offer. She knew nothing of the personality or financial responsibility of the proposed purchaser. Even though her letter of November 3 be construed as an offer to take \$800 net for the lot, such offer could only be accepted by tendering the money. No such tender was made. Mr. Foss' telegram, saying, "Offer accepted," was not, without any tender, such an acceptance as would convert her offer into a binding contract of sale. *Sawyer v. Brossart*, 67 Iowa 678, 25 N.W. 876, 56 Am. Rep. 371; *Sands & Maxwell Lumber Co. v. Crosby*, 74 Mich. 313, 41 N.W. 899; *De Jonge v. Hunt*, 103 Mich. 94, 61 N.W. 341. Not having received the cash or any tender thereof, Mrs. Ater, who knew of other intending purchasers, wired Louis Foss & Co.: "Awaiting guarantee eight hundred cash net. I will send abstract." This wire shows that she was adhering to her original proposition, the substance of which was to sell for cash only, and that cash was necessary to complete the purchase and bind any bargain. Foss did not then remit the cash to her, but took it upon him-

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self to deposit it with the Pacific National Bank in Tacoma. At his request the bank then wired the defendant for her acceptance of such guaranty. She never made or indicated any acceptance of the same. On the contrary she by wire immediately advised Mr. Foss that the lot was sold, thus terminating the negotiations. The correspondence between the parties, conducted in contemplation of a proposed sale by Mrs. Ater, never culminated in an enforceable contract upon her part. Her original offer must be construed as one to sell for \$800 cash net to her in New York. The only attempted acceptance of such offer was communicated by a wire reading, "Offer accepted," which was transmitted to New York without any tender of cash to complete the acceptance or bind the proposed bargain. No contract was thereafter completed by the subsequent letters and telegrams. Mrs. Ater immediately demanded a guaranty for the \$800, but Mr. Foss, without authority from her, deposited his checks in the Pacific National Bank of Tacoma. At his request the bank cashier added to the telegram advising Mrs. Ater of the deposit, the words: "Wire acceptance." These words amounted to a recognition by Foss and the cashier of the fact that Mrs. Ater had the right to, and might, accept or reject such proposed guaranty. She was entitled to, and could have demanded, a tender, deposit, or payment of the money or guaranty in New York City. It may have been, and probably was, the intention of Foss to comply with such demand. The negotiations, however, were still pending, and the evidence is that, before any agreement as to the details of payment, tender, or guaranty was made, the negotiations ceased, and Mrs. Ater advised Foss that the lot had been sold. These facts, which are without substantial dispute, dispose of the plaintiff's contention for the existence of a valid contract of sale. The negotiations were never completed. The minds of the parties did not finally meet on the necessary terms and conditions of the proposed sale.

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On the issues between defendant, Mrs. Ater, and the intervenor, O. E. Darling, the trial judge made findings of fact from which it appears that, about October 24, 1902, the defendant, Mrs. Ater, in writing, listed the lot here involved and other property with one W. M. Ostrander, a real estate broker in Philadelphia, Pennsylvania, as follows:

"I have this 24th day of October, 1902, placed in the hands of W. M. Ostrander, of Philadelphia, Pennsylvania, for sale of my property located in Tacoma, Washington, consisting of twenty acre building site, ten acre farming land and one building lot, said property to be sold for the sum of twelve thousand dollars (\$12,000).

"I agree to pay unto the said W. M. Ostrander a commission of two per cent (2 per cent) of selling price when sale and settlement are made, less the sum of twenty dollars (\$20), which I have already paid him as a retaining fee. I reserve the right to withdraw the property from the said W. M. Ostrander's hands at any time.

"I further agree that if the sale of this property be effected by myself or by any person other than the said W. M. Ostrander, I will immediately notify the said W. M. Ostrander of the fact, and will give him the name of the purchaser or purchasers of this property.

"In witness whereof I have hereunto set my hand and seal the day and year above written.

"(Signed) Emma J. Ater;"

that on October 25, 1905, W. G. Peters & Co., real estate brokers in Tacoma, Washington, executed and delivered to the intervenor, O. E. Darling, a purported written contract wherein they, as agents, agreed to sell lot 5 in block 7522 to O. E. Darling for the sum of \$725, which was increased by a modification of the writing to \$800; that the contract so executed is the contract of sale sought to be enforced by the intervenor in this action; that the defendant never had any communication with W. G. Peters & Co. or O. E. Darling; that on November 6, 1905, W. G. Peters & Co. sent the following telegram to W. M. Ostrander:

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"Offer Ater seven hundred fifty; obtain her contract; wire confirmation."

to which Ostrander replied as follows; the reply being received by Peters & Co. about November 12, 1905:

"In reply to your telegram, I am sending New York representative in today to interview the owner of the lot, and hope to have a telegram in your hands confirming a sale at \$750;" that on November 9, Ostrander sent the following telegram to W. G. Peters & Co.: "Close deal for Ater lot at seven fifty net;" that on the same day he also wrote W. G. Peters & Co. as follows:

"Nov. 9th, 1905.

"Messrs. W. G. Peters & Co., 402 Chamber of Commerce,
"Tacoma, Washington,

"Dear Sir:—Confirming my telegram of even date will say that Mrs. Ater today accepts an offer that will enable me to deliver the property to you at \$750 net. If you will send me the name of the bank to which the deed can be forwarded for settlement, I will have the proper instrument executed and send it to you at once. I trust this matter can be closed promptly, now that I have Mrs. Ater in shape to do business. I remain,

"Very truly yours, W. M. Ostrander, President;"
that W. G. Peters & Co. replied as follows:

"Nov. 11th, 1905.

"W. M. Ostrander, Philadelphia, Pa.:

"Dear Sir:—In accordance with your telegram of the 9th inst., would say that we have closed the sale of the Ater lot 5, block 7522, and presume, of course, that they have an abstract of title, and therefore kindly request them to send same to you, which please forward to me. As soon as the title has been examined, or perhaps before, we will send you the deed for execution, with instructions as to drawing on us, with deed attached. We trust you have a contract with her which is binding, so that we will have no delay in closing the sale. Yours very truly, W. G. Peters & Co.;"

that on November 13, 1905, Ostrander wrote W. G. Peters & Co. as follows:

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“Nov. 13th, 1905.

“W. G. Peters & Co., Tacoma, Washington:

“Gentlemen:—We have received from Mrs. Ater today her abstract of title covering lot 5, block 7522, and notice that the deed is executed in your favor, and is held by our New York office ready for a settlement, which we can make on a basis of \$750 net to us. If you will advise us the name of the bank through which you want the settlement made, I will forward at once the deed and abstract, with proper instructions. We secured these papers at the cost of a good bit of effort, there being another agent in the field who offered her \$800 for the same property, and under the circumstances it would be a very great favor if you would so arrange matters that a settlement could be made within thirty days' time. I am, with regards,

“Yours very truly, W. M. Ostrander, President,”
to which W. G. Peters & Co. replied as follows:

“Nov. 18th, 1905.

“W. M. Ostrander, Philadelphia, Pa.:

“Dear Sir:—Yours of the 13th inst. received and contents noted. We enclose a deed for the signature of Mrs. Ater, which kindly have executed, as we do not desire the title to pass to us, but to the purchaser of the property, who is named as grantee in the deed enclosed. The deal will be promptly closed as soon as the title has been examined, which will only take a few days, after the receipt of the paper. Kindly draw on us for \$750 through the Pacific National Bank, of Tacoma. Trusting you will promptly attend to this, we remain, yours truly, W. G. Peters & Co.”

that on November 21, 1905, Ostrander also sent the following letter to W. G. Peters & Co.:

“Nov. 21st, 1905.

**“W. G. Peters & Co., 402 Chamber of Commerce,
“Tacoma, Washington:**

“Gentlemen:—I am sending forward today to the National Bank of Commerce, Tacoma, the deed and abstract for the Emma J. Ater lot, this being No. 5, block 7522, Tacoma Land Company's First Addition. The bank will have instructions to deliver the same to you upon the payment of \$750 net, and will allow sufficient time for examining and continuing the abstract to determine title. You will find

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upon examination of the deed that this has been executed in blank; that is, the grantee's name is omitted. The deed was prepared in this way so that you could make an early settlement and fill in the name of the purchaser when you are ready to complete the deal. We are sending the papers forward in order that as early a settlement as possible can be effected, and would advise you to make every effort to have the purchaser take up the matter at once. We have experienced considerable difficulty in getting this deed from the former owner; and since we have had it she claims that she had had several offers, one of them for \$1,000, and that her agent in Tacoma is threatening service and attachments which may tie up the deal unless your purchaser can act promptly. Hoping that you will make every effort to secure action before any difficulty arises, I remain,

"Yours very truly, W. M. Ostrander, President."

That on November 10, 1905, one Wm. C. Moore, the New York representative of Ostrander, pursuant to his instructions, went to defendant at her residence in New York City, and offered her \$700 for the lot, stating that sum to be the best price obtainable; that the defendant was never informed by Peters & Co., or by Ostrander, or by his New York representative, that a contract of sale had been entered into with O. E. Darling for \$800; that she never authorized or approved any such sale; that she did not know until after the commencement of this action that the alleged written contract of sale had been entered into; that on or about November 10, 1905, the defendant, at the request of Mr. Moore, signed a deed for the lot, without the name of any grantee written therein; that the deed was signed by her on the statement of Moore that it was necessary to enable them to make proper search of the title; that she at the time received from Moore a written certificate to the effect that she would be paid the purchase price on approval of the title; that afterwards the defendant, without any notice or knowledge that Ostrander or any one else had pretended to make or enter into a contract of sale with the intervener Darling, paid to Mr. Moore, as representative of Ostrander, \$100 for

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the return of the blank deed, which she had theretofore signed, and in which no grantee's name had yet been inserted, and surrendered the certificate which had been given her when the deed was signed; that she never authorized Peters & Co. or W. M. Ostrander to enter into any contract of sale with the intervener or with any one else, and that the agreement with Darling was never submitted to her; that her approval thereto was never asked or obtained.

These findings, which are clearly sustained by the evidence, support the final judgment entered against the intervener. It nowhere appears that Peters & Co. had any authority to enter or execute any written contract of sale on behalf of the defendant with the intervener Darling; nor that the agent Ostrander had authority to enter into any such contract or to authorize Peters & Co. to do so. The evidence shows that Ostrander never claimed any such authority. All that he did when he received an offer for the lot was to open negotiations with the defendant, by submitting other offers to her for acceptance or refusal. The alleged written contract executed by Peters & Co. expressly recited that it was made subject to approval and ratification by the owner of the property. The undisputed evidence shows that it was never submitted to her for approval, and that she had no knowledge of its existence at any time prior to the commencement of this action. The intervener contends that the court erred in excluding certain letters which he offered in evidence for the purpose of showing certain authority in Peters & Co. as subagents appointed by Ostrander. Without discussing these offers in detail, we hold the letters were immaterial, and that no prejudicial error was committed in this regard. Ostrander had no power to appoint subagents and delegate to them authority to execute a written contract of sale which would be binding upon the defendant.

The intervener further contends that Mrs. Ater executed the blank deed as a conveyance to any purchaser who might be secured by Ostrander, and not as a conveyance to

Ostrander himself; that by such deed she ratified the contract of sale made by Peters & Co., as agents, and that, even though Peters & Co. were not her subagents, she thereby accepted their offer made to Ostrander. These contentions cannot be sustained. The deed was never sent to Peters & Co. Mrs. Ater never knew of the offer made by them. They were attempting to make the sale to Darling for \$800. This fact was never communicated to her by them or by any other person. She did not ratify a contract the terms of which were unknown to her. We approve the findings made by the trial court, and hold that they sustain the final judgment.

The judgments entered against the plaintiff and the intervenor are, in all respects, affirmed.

HADLEY, C. J., MOUNT, FULLERTON, RUDKIN, and DUXBAR, JJ., concur.

[No. 7143. Decided May 28, 1908.]

In the Matter of Frank H. Donnellan.¹

CONSTITUTIONAL LAW—CLASS LEGISLATION—SUNDAY—PROHIBITION OF AMUSEMENTS—POLICE POWER. Bal. Code, § 7250, prohibiting the keeping open of any theater on Sunday is not unconstitutional as unreasonable, arbitrary or unnecessary for the protection of public health, safety or morals, or objectionable as class legislation, but is valid as an appropriate exercise of the police power.

STATUTES—IMPLIED REPEAL. The act of 1866 prohibiting the engaging of certain callings on Sunday was impliedly repealed by the act of 1881 covering the same subject.

STATUTES—SUBJECTS AND TITLES—NUMBER—EXPRESSION IN TITLE—CRIMES AND PUNISHMENTS. A general statute enacted as a complete penal code, relating to all ordinary crimes, entitled "an act relative to crimes and punishments and proceedings in criminal cases" does not violate the organic act (U. S. Rev. St., § 1924) which provides that every law shall embrace but one subject expressed in its title; and the act may include a statute making it a misdemeanor to open a theater on Sunday.

¹Reported in 95 Pac. 1085.

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SAME—ENACTMENT—VALIDITY. The penal code of 1881 having been enacted as an original bill, it is immaterial that the same was compiled by a commissioner who was without authority to prepare it.

SAME—CONTINUATION OF PRIOR LAWS. The fact that an original bill embraces a portion of a prior law on the same subject does not make it a mere continuation of the prior law.

SAME—REPEALING PROVISIONS—EFFECT. The penal code of 1881 is shown to be an independent act complete in itself by § 1295 repealing all former laws.

SAME—SUBJECTS AND TITLES—EXPRESSION IN TITLE. An act entitled "an act defining certain crimes and declaring their punishment and amending the code of 1881 and certain statutes on the same subject" is sufficiently broad to include the re-enactment of a section of the code of 1881 providing a punishment for keeping open a theater on Sunday.

SAME—REPEAL—INVALID REENACTMENT OF PRIOR LAWS—EFFECT—REPEAL. The insufficiency of the title of an act, does not affect the validity of sections which were simply the re-enactment of valid existing laws, where the act expressly continues in force all acts relating to the same subject not repugnant to the provisions of the act.

Application filed in the supreme court December 27, 1907, for a writ of habeas corpus to discharge from custody a defendant charged with the crime of keeping a theater open on Sunday. Denied.

F. C. Robertson, M. J. Gordon, Fred H. Lyons, and Harry Rosenhaupt, for petitioner.

Kenneth Mackintosh and John H. Perry, for respondent.

MOUNT, J.—This is an application for discharge on writ of habeas corpus. The petitioner alleges that he is restrained of his liberty by the sheriff of King county, under a complaint in justice court charging the petitioner with having kept open a theater and place of amusement on Sunday, and therein performed as an actor, in violation of Bal. Code, § 7250 (P. C. § 1886), and that petitioner is unlawfully restrained of his liberty by reason of the unconstitutionality of the statute named. It is claimed that the section in question is uncon-

stitutional upon the following grounds: (1) Because it is unreasonable, arbitrary, unjust, and unnecessary for the protection of the public health, safety, or morals; (2) because the original act of 1886 provided expressly that it should not apply to Snohomish county; (3) because the act of 1881 embraces more than one subject not expressed in the title; and (4) because the title of the act of 1891 is not sufficient to include the subject of this section. We shall consider these grounds in the order stated.

The section in question is as follows:

"Any person who shall keep open any playhouse or theater, race ground, cock pit, or play at any game of chance for gain, or engage in any noisy amusements, or keep open any drinking or billiard saloon, or sell or dispose of any intoxicating liquors as a beverage, on the first day of the week, commonly called Sunday, shall, upon conviction thereof, be punished by a fine of not less than thirty dollars nor more than two hundred and fifty dollars. All fines collected for the violation of this section shall be paid into the common school fund." Bal. Code, § 7250 (P. C. § 1886).

It will be readily seen that this section prohibits any person from keeping open on Sunday the places stated. In the case of *State v. Herald*, 47 Wash. 538, 92 Pac. 376, we held that this section was intended to prevent the opening of theaters and playhouses for theatrical or dramatic performances, and that as so construed it does not abridge the privileges of citizens as guaranteed by the fourteenth amendment of the constitution of the United States, or §12, art. 1, of the state constitution. In the case of *State v. Nichols*, 28 Wash. 628, 69 Pac. 372, we had under consideration the validity of Bal. Code, § 7251 (P. C. § 1887), being the section following the one now under consideration. That section provides that it shall be unlawful for any person to open on Sunday, for the purpose of trade or sale of goods, wares, or merchandise, any shop, store, or building or place of business whatever; and the same objections were made to that section as are now urged against § 7250. After considering and citing many authori-

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ties, to the point that Sunday laws are within the general police powers of the state, we said:

"It may well be concluded that the power of the legislature to enact these laws, as an appropriate exercise of the police power, is set at rest by judicial authority."

Further on, in considering the same case, we said:

"There have been different views in the minds of legislators as to what particular acts were works of necessity or charity. They have been uniform in regarding all noisy occupations and amusements and trades as within the substance of the law. The statute (§ 7251, *supra*) forbids the opening on Sunday, for the purpose of trade or sale of all goods, wares, and merchandise at any place of business whatever. Here is the plain legislative expression that the sanitary, moral, and physical good of the community requires the cessation of these labors on Sunday."

This language may be as appropriately used with reference to § 7250, which imposes a penalty upon any person who shall keep open a playhouse or theater on Sunday, as it was to the section then under consideration.

In 27 Am. & Eng. Ency. Law (2d ed.), p. 390, it is stated:

"Sunday laws are generally sustained as constitutional on the ground that, since Sunday is a civil and political institution, established for the purpose of promoting the moral and physical well-being of society, they are within the domain of the police power of the states. In asserting their unconstitutionality it has been claimed that they were in violation of the provisions safeguarding equal rights, personal or religious liberty, or that they took away liberty and property without due process of law, but where not so drawn as to be objectionable as class legislation, they have been sustained almost without exception."

Numerous cases are there cited in support of the text, including *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; and *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716.

In 28 Am. & Eng. Ency. Law (2d ed.), p. 118, the rule is stated as follows:

"The state has the right to pass statutes prohibiting any sort of public exhibition or amusement on Sunday, in order to preserve peace and order."

See, also, Brackett's Theatrical Law, p. 471; *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177. We are satisfied that this is the general rule and that the section in question is not subject to the objections made upon the ground first stated.

We are also satisfied that it is not objectionable as class legislation because, where the state has a right to prohibit amusements, it must necessarily follow that any particular kind of amusement may be singled out and prohibited by law and special penalties attached for a violation thereof, and all persons engaged in such amusements must comply with the law. The right to labor in a certain way, or to pursue a certain calling or profession, depends upon the power of the state to prohibit or regulate such occupation, calling, or profession. It will not be necessary to consider the act of 1866 independently, because that act, if unconstitutional upon the ground urged, is no longer in force. If it was not expressly repealed by the act of 1881, it was impliedly repealed by that act, because that act covered the same subject as the act of 1866. We shall, therefore, pass to a consideration of the act of 1881.

It is argued that the act of 1881 is in violation of the provision of the organic act, U. S. Rev. Stats § 1924, and of the state constitution, which provides that every law shall embrace but one subject and that shall be expressed in the title, because the act of 1881 embraces more than one subject not expressed in the title. The proceedings of the legislative session of 1881 shows that the law as it appears in the "Code of Washington, 1881," from § 764 to § 1296, inclusive, was passed as one bill. The section upon which this prosecution is based appears in the act of 1881 as §§ 1266, 1268, and

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1270. The title of the act of 1881 is as follows: "The Penal Code. An act relative to crimes and punishments and proceedings in criminal cases." This act was passed as a complete penal code. All the usual ordinary crimes were therein defined and punishments provided therefor, and the criminal procedure was also prescribed. After that act became a law, it was continuously followed in the territory, and has been followed since statehood, except where amended.

In *State v. Tieman*, 32 Wash. 294, 78 Pac. 375, 98 Am. St. 854, where the same question now presented was raised in reference to §§ 1214 to 1221 of this act, we said, quoting from *Marston v. Humes*, 8 Wash. 267, 28 Pac. 520:

"The legislature may adopt just as comprehensive a title as it sees fit, and if such title when taken by itself relates to a unified subject or object, it is good, however much such unified subject is capable of division."

We then concluded the discussion of the question by saying:

"Tested by this rule, it is clear that it was competent for the legislature, under the title which it adopted for the act in question, to include in the body of the act anything which related to crimes and their punishment and proceedings of a criminal nature."

In addition to what was there said, we may now state that this court has often held that general titles expressive of the subject of the act include all special matters relating thereto without specifically naming them. *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035; *Johnston v. Wood*, 19 Wash. 441, 58 Pac. 707; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110. Hence the title of an act need not be a complete index thereof. *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060. We have no doubt that the title of the act of 1881 answered every requirement of the Federal statute, and is not opposed to our

constitution, and that under such title the legislature had authority to enact the statute in question making it a misdemeanor to open a theater for amusement on Sunday.

It is also claimed that the act of 1881 was but a compilation of existing laws and not the creation of new offenses, because the act was initiated by a commissioner authorized to "reduce and bring into a written, intelligible, and systematic form statute laws of the territory." But what may have been the power of such commissioner or the one appointed under the provisions of § 3322, Code of 1881, is unimportant in view of the fact that the "penal code," being the act of 1881, was introduced as an original bill, and was passed as such by the legislature itself, and was approved by the governor. It was, therefore, a valid law, even if the person who prepared the bill was not authorized to prepare it. Neither was the act of 1881 merely a continuation of the act of 1866. It was an entirely new act. The mere fact that it embraced a portion of the act of 1866 upon the same subject need not be considered now, for the new act took the place of the old and unless it is subject to the objections of the old, those objections cannot now be made. That the act of 1881 under consideration is a new and independent act complete within itself is evidenced by the section next to the last, as follows:

"Sec. 1295. No statute, law or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code all statutes, laws, and rules heretofore in force in this territory, whether consistent or not, with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated." Code of 1881, §1295.

It is also urged that § 25 of chapter 69 of the Laws of 1891, page 127, is invalid, because the title of the act is not sufficiently broad to include the subject of this section. This section 25 of the act of 1891 is the same as Bal. Code, § 7250

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(P. C. §1886). It was enacted in that form as an amendment to §1266 of the Code of Washington of 1881, under a title as follows: "An act defining certain crimes and declaring their punishment and amending the Code of 1881 and certain other statutes in relation to the same subject." Laws of 1891, p. 119. We think this title is sufficient under the rule announced in *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. 831, as follows:

"No elaborate statement of the subject of an act is necessary to meet the spirit of the constitution. A few well-chosen words, suggestive of the general subject treated, is all that is required."

See, also, *Marston v. Humes, supra*; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Scott*, 32 Wash. 279, 73 Pac. 365.

If we were to hold, however, that this amendment was void because in violation of the constitution in the respect claimed, such holding would not avail the petitioner in this case, because the amendatory act of 1891 did not change the substance of the law upon the subject of Sunday observance. It simply put into one section what before was contained in three separate sections, viz., §§1266, 1268, and 1270. See, *State v. Binnard*, 21 Wash. 349, 58 Pac. 210.

This act of 1891 does not repeal any prior law, but expressly provides in the last section:

"All acts and parts of acts in force at the time of the passage of this act relating to the same subject are continued in force so far as not repugnant to the provisions of this act, and the provisions of this act, so far as they are the same as those of acts and parts of acts upon the same subject in force at the time of the passage hereof, shall be construed as continuations of such provisions." Laws of 1891, page 119, §46.

Since the amendment of 1891 did not change in any respect the law under consideration, the validity or invalidity of the amendment is entirely immaterial.

We find no substantial basis for the contention that the statute under consideration is invalid. The application must therefore be denied.

HADLEY, C. J., FULLERTON, DUNBAR, CROW, and Root, JJ., concur.

RUDKIN, J., took no part.

[No. 7282. Decided May 28, 1908.]

THE STATE OF WASHINGTON, *on the Relation of P. H. Lack, Appellant, v. JOHN F. MEADS, Respondent.*¹

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. An appeal from a judgment dismissing an action for a writ of mandamus to compel the issuance of a city warrant for the sum of \$140.75 will be dismissed for the reason that the original amount in controversy is not within the appellate jurisdiction of the supreme court.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 28, 1907, dismissing an action for a mandamus, after a trial on the merits before the court. Appeal dismissed.

L. C. Whitney, for appellant.

C. M. Riddell, J. W. Quick, and C. E. Dunkleberger, for respondent.

PER CURIAM.—Some time prior to the 11th day of May, 1907, the city of Tacoma purchased sand and gravel from one C. D. Elmore, of the value of \$140.75, for which amount a claim was presented to the city council. After the presentation of the claim, but before its allowance, the claim was assigned to the relator Lack. After the assignment to Lack, the city council allowed the claim as presented, and

¹Reported in 95 Pac. 1022.

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credited the amount on an unpaid judgment held by the city against Elmore. The relator thereupon demanded a warrant for the amount of the claim from the city comptroller, and upon the refusal of that officer to issue the warrant, this action was brought in mandamus to compel such issuance. From a judgment dismissing the mandamus proceeding, this appeal is prosecuted.

The respondent has moved to dismiss the appeal for the reason that the original amount in controversy is not sufficient to bring the case within the appellate jurisdiction of this court. We so held in *State ex rel. Plaisie v. Cole*, 40 Wash. 474, 82 Pac. 749, and *State ex rel. Ide v. Coon*, 40 Wash. 682, 82 Pac. 993.

On the authority of these cases the appeal must be dismissed, and it is so ordered.

[No. 7195. Decided May 28, 1908.]

**H. R. HUTCHINSON et al., Plaintiffs, v. MT. VERNON WATER
AND POWER COMPANY, Defendant.¹**

PLEADING—CAUSES—SOURCES OF TITLE—SEPARATE STATEMENT—ELECTION. In an action to establish water rights, based upon the plaintiffs' claims under (1) riparian ownership, (2) appropriation, and (3) contract, a motion to separately state the several causes of action and to elect upon which they will rely is properly overruled; since there was but one indivisible cause of action, and the independent sources of plaintiff's title do not constitute separate causes.

COMPROMISE AND SETTLEMENT—CONTRACT—CONSIDERATION. An agreement or compromise fixing the rights of several parties in the future use of the waters of a spring is supported by a sufficient consideration where the parties seeking to enforce the contract had previously claimed in good faith as riparian owners and appropriators of a specified portion of the water, and the compromise recites such claim and that the same is superior to the claim of the other party to the contract.

¹Reported in 95 Pac. 1023.

CONTRACTS—FORFEITURE—CONSTRUCTION. In an action to enforce a contract, a clause of which provided that the plaintiffs' rights should remain the same in case of forfeiture by the defendant, the question of forfeiture is immaterial.

DAMAGES — SUBSTANTIAL DAMAGES — EVIDENCE — SUFFICIENCY — OPINIONS — COMPETENCY. The evidence is sufficient to establish substantial damages, and it is error to find only nominal damages, where it appears that, in violation of a contract, a water company failed for three years to supply water to plaintiff for the purpose of irrigating a garden tract of nine acres, whereby the crops failed to mature for lack of water and were materially damaged, and that the net value of the crop for 1904 was \$600 less than it would have been, and for 1905, \$700 less, and for 1906, \$860 less, according to the estimate or opinion of one of the parties, which is competent but not conclusive evidence of the actual loss; and judgment for substantial damages will be given in at least the sum appearing to have been sustained.

Cross-appeals from a judgment of the superior court for Skagit county, Joiner, J., entered June 26, 1907, upon findings by the court, after a trial on the merits without a jury, establishing the right to the use of waters appropriated for irrigation purposes, but denying plaintiff judgment for damages. Affirmed on defendant's appeal and reversed on plaintiff's appeal.

Million, Houser & Shrauger, for plaintiffs.

Willis B. Herr and Thomas Smith, for defendant.

RUDKIN, J.—The plaintiffs are the owners of a small tract of land in the vicinity of Mount Vernon, in Skagit county, devoted largely to farming and gardening. On the 6th day of August, 1901, the plaintiff H. R. Hutchinson filed in the office of the county auditor a notice of appropriation of the water of a certain spring, situated on lands now owned by the defendant and flowing through a ditch or brook over and across the lands of the plaintiffs, to the extent of 43 $\frac{1}{2}$ cubic inches per second of time, for the purpose of irrigating the lands above described. Since the filing of this notice the plaintiffs have diverted and used the water flowing from

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the spring for irrigation and domestic purposes to the extent of their appropriation, except in so far as their right to such use has been interfered with by the acts of the defendant. Some time prior to the 29th day of October, 1902, the defendant was incorporated for the purpose of supplying the inhabitants of the town of Mount Vernon with water for domestic purposes, and on the latter date the plaintiffs and the defendants entered into a written contract defining and regulating the rights of the respective parties to the use of the water flowing from the spring in controversy. This contract recited the filing of notice of appropriation by the plaintiffs, as above set forth; the filing by the defendant of a water right on the water flowing from the same spring in excess of the plaintiff's claim, should there be any such excess; that the defendant was about to erect a water system under a franchise from the town of Mount Vernon, and was desirous of securing water for its system from the spring, and that there was a question whether the spring would furnish sufficient water to irrigate the plaintiffs' land and supply the proposed water system. It was therefore agreed between the parties that the defendant might use sufficient of the water flowing from the spring to supply its system, but should at all times permit a sufficient overflow through the usual course or channel to irrigate the garden and celery garden of the plaintiffs to the extent of their appropriation as theretofore made; that, if the supply was not sufficient for the needs of both parties, the defendant should pump water from the Skagit river in sufficient quantities to make up the deficiency in the plaintiffs' appropriation, and discharge the same into the usual water course running from the spring; that the defendant should lay a pipe line from its reservoir to the plaintiffs' premises, and furnish water for certain purposes free of cost; that the plaintiffs did not relinquish any of their rights as appropriators; that a forfeiture might at any time be declared for the failure of the defendant to comply with the provisions

of the contract; that in case of forfeiture the defendant would permit water to flow from the spring in its usual channel sufficient in quantity to supply the needs of the plaintiffs and to the extent of their appropriation; and that the contract should continue in force for the period of thirty years. The defendant thereafter installed its water system and for some time complied with the provisions of the above contract, but during the years 1904, 1905, and 1906, the quantity of water permitted to flow through the plaintiffs' premises was materially less than called for by their appropriation and their agreement with the defendant. This action was instituted for the purpose of establishing the right of the plaintiffs to the use of the water in controversy, for an injunction and for damages. From a judgment awarding a permanent injunction as prayed, and for nominal damages, both parties have appealed, the plaintiffs from that portion of the judgment denying them substantial damages, and the defendant from the entire judgment. Inasmuch as both parties have appealed, we will refer to them as designated in the court below.

In their complaint the plaintiffs based their right or title to the water on three grounds: (1) As riparian owners on the water course through which the water flowed; (2) as appropriators; and (3), under the contract as above set forth. The defendant moved the court to require the plaintiffs to separately state their several causes of action, and later to require the plaintiffs to elect on which of their several causes of action they intended to rely. These motions were properly denied. In actions to recover or establish rights in property, each independent source through which a plaintiff claims does not constitute a separate cause of action. The ultimate facts upon which the plaintiffs relied for a recovery in this case were their right or title to the water and the defendant's wrongful interference therewith. This cause of action was one and indivisible, regardless of the sources through which the plaintiffs might claim.

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The answer of the defendant attacked the plaintiff's right as riparian owners and as appropriators, on the ground that there was no water course to which riparian rights could attach, or from which an appropriation could be made. The answer further attacked the contract set forth in the complaint on several grounds: (1) Because the contract was executed in the name of the corporation without its authority; (2) because there was no consideration therefor; (3) because the contract had been forfeited and terminated by the act of the plaintiffs; and, (4) because of a settlement and adjustment of all rights growing out of the contract.

The court below held that the rights of the parties were fixed by the contract, and if this conclusion is correct, we need not consider the rights of the plaintiffs as riparian owners or appropriators, except in so far as such rights may constitute the consideration for the contract itself. The objection that the contract was not executed by authority of the corporation finds no support in the record and was abandoned at the trial. The claim that there was no consideration for the contract is equally without merit. The contract was manifestly entered into in good faith for the purpose of adjusting and placing beyond dispute the rights and claims of the respective parties to the water now in controversy, and the general rule in regard to such settlements is this:

"The rule is well settled that an agreement of compromise is supported by a sufficient consideration where it is in settlement of a claim which is unliquidated, where it is in settlement of a claim which is disputed, or where it is in settlement of a claim which is doubtful. There are cases to the effect that in order to support a compromise in avoidance of litigation the claim must be an actual one, founded upon a colorable right about which there is room for honest doubt and actual dispute, and with some legal or equitable foundation, and not one which is without foundation, and is known to be so, or is in its nature an illegal claim out of which no cause of action can arise in favor of the person asserting it. The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be not whether

the matter in dispute was really doubtful, but whether or not the parties bona fide considered it so, and that the compromise of a disputed claim made bona fide is upon a sufficient consideration, without regard to whether the claim be in suit or not. The law favors the avoidance or settlement of litigation, and compromise in good faith for such purposes will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or the character or validity of the claims of the parties, and even though a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed. The real consideration which each party receives under such a compromise is, according to some authorities, not the sacrifice of the right, but the settlement of the dispute." 8 Cyc. 505 et seq.

This rule is amply sustained by the authorities, and the testimony brings the case at bar clearly within it. The contract recites the right or title under which the plaintiffs claim, and that such right or title is prior and superior to that of the defendant; the proof clearly shows that the contract was entered into in good faith for the purpose of adjusting and settling disputed claims, and that the claim of the plaintiffs was at least doubtful. Further than this, we are not required to go. The claim of forfeiture is not sustained by the testimony, but in any event the contract provided that the rights of the plaintiffs after forfeiture should be substantially the same as those guaranteed by the contract, so that the question of forfeiture is not material. The claim that there was a subsequent settlement and adjustment of all differences growing out of the contract is not sustained by the testimony, and upon the entire record we are satisfied that the judgment of the court below is clearly right in so far as the appeal of the defendant is concerned.

The plaintiffs have appealed from the refusal of the court to award them more than nominal damages. On the question of damages the court made the following findings:

"(4) That plaintiff's lands hereinbefore described, lay about a quarter of a mile south of said spring, and about nine acres of the same are in a high state of cultivation and

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for a number of years last past have been used for gardening and for the raising of celery and general gardening, and for such purposes during the dry season of the year require irrigation in order to produce crops of such character."

"(8) That during the years 1904, 1905 and 1906, the defendant, in violation of the terms of said agreement, failed and refused to furnish the water needed by plaintiffs, and at their request, either for purposes of irrigation, or domestic purposes, or for their stock, and failed to supply said water during the dry season of said years, as provided in said contract, to the full amount required and requested by said plaintiffs, said amount so required and requested not being in excess of the amount of said appropriation, and a short time prior to the bringing of plaintiff's action said defendant entirely repudiated said contract and does now repudiate the same, and refuses to carry out the terms thereof and supply plaintiffs with water, according to its terms and conditions, either for irrigation purposes, or for domestic use. That during said periods defendant appropriated substantially the whole of the waters of said spring to its own use and now threatens to continue to do so in violation of said agreement."

"(7) That during the years 1904, 1905 and 1906, the defendant, during a portion of the cropping season for said years, failed and refused to furnish the water as required by plaintiffs in pursuance of the terms of said contract upon their request, and by reason of such failure the celery and other garden products of said plaintiffs failed to properly mature, and they sustained damages each of said seasons by reason thereof, but the court finds that the evidence in the case is insufficient to enable the court to fix the amount, or make any estimate as to the damages sustained, for the reason that the evidence introduced in support thereof was not competent or proper evidence, and formed no basis for the court to make any independent estimate as to the damages sustained. The court therefore finds that plaintiffs are only entitled to recover in this case nominal damages, in the sum of Five dollars. That if the evidence is competent and legally sufficient as proof of damages, then the court finds that thereunder plaintiffs would be entitled to recover damages for the three years 1904, 1905 and 1906 in the total sum of \$2,160.00. To all of which defendant excepts and its exception is by the court allowed. To the court's finding that the

proof of damages is insufficient to establish any damages other than nominal damages, plaintiffs except and their exception is by the court allowed."

The conclusion of the court that the testimony was not competent to show more than nominal damages is, in our opinion, erroneous. The proofs clearly show that the crops were materially damaged during each of the years 1904, 1905, and 1906 for lack of water, and the court so found. One of the plaintiffs testified to the character of the crops grown, the injury to the crops for lack of water, and that the net value of the crop for 1904 was \$600 less than it would have been had the plaintiffs been furnished water under the contract as agreed; that the net loss for 1905 was \$700, and for 1906, \$860. These several items doubtless made up the \$2,160 referred to in the court's findings. This testimony was clearly competent and showed substantial damages. The finding or conclusion of the court: "That if the evidence is competent and legally sufficient as proof of damages then the court finds that thereunder plaintiffs would be entitled to recover damages for the three years 1904, 1905, and 1906 in the total sum of \$2,160," is peculiar to say the least. Whether the testimony was competent presented a question of law, but whether it was legally sufficient as proof presented a question of fact upon which the court below should have found. While we are satisfied that substantial damages resulted to the plaintiffs, we are not willing to accept the estimate of one of the parties as to these damages where such estimate is largely a matter of opinion. We are convinced, however, that the plaintiffs suffered damages in at least the sum of \$500, on account of the deprivation of water for the years referred to through the wrongful acts of the defendant, and the judgment will be modified accordingly. As thus modified the judgment must be affirmed, and it is so ordered. The plaintiffs will recover their costs on appeal.

HADLEY, C. J., FULLERTON, DUNBAR, CROW, MOUNT, and Root, JJ., concur.

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Statement of Case.

[No. 6946. Decided May 28, 1908.]

CHARLES THEIS, Respondent, v. SPOKANE FALLS GAS LIGHT COMPANY et al., Appellants, N. W. HALSEY et al., Defendants.¹

CORPORATIONS—GAS—FRANCHISES—COMBINATIONS — CONSTRUCTION—IMPLIED REPEAL. An ordinance granting a franchise to a gas company, which forbids any combination with any competitor under penalty of forfeiture of the franchise, is, as to such penalty, impliedly repealed by a later ordinance granting a franchise to another gas company expressly authorizing a combination with the old company.

SAME—REPRESENTATION—ACTS ULTRA VIRES—COMBINATIONS—STOCKHOLDERS—RIGHTS OF MINORITY. Minority stockholders of a gas company having a franchise to manufacture and sell gas to consumers cannot object that the action of the officers and majority stockholders in entering into an arrangement to purchase gas from a new company controlled by such officers and stockholders is ultra vires, the old company having power to "purchase real and personal property," and the two companies being authorized by their franchises to combine.

SAME—INJURY TO MINORITY—EVIDENCE—SUFFICIENCY. A stockholder owning eight out of fifteen hundred shares of the capital stock of a gas company cannot complain of the action of the officers controlling all the other shares in making a contract with a new gas company controlled by them whereby the old company was to purchase all its gas from the new company, organized by them to furnish the same, rather than borrow money to enable the old company to enlarge its business to meet growing demands, where it appears that the old company thereby obtained its gas at a saving of over twenty thousand dollars less expense per year than it could manufacture the same for in its own plant, and that its affairs were economically managed; since the discretion of the majority in deciding not to increase the capacity of the old company is an act *intra vires* that cannot be questioned by the minority.

RUDKIN and DUNBAR, JJ., dissenting.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 18, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the

¹Reported in 95 Pac. 1074.

court without a jury, in an action brought by a stockholder to enjoin the union and consolidation of two corporations. Reversed.

Gallagher & Thayer (*W. J. Thayer, Franklin W. M. Cutcheon, and Augustine L. Humes*, of counsel), for appellants.

Post, Avery & Higgins, for respondent, contended, among other things, that the plaintiff has a right to injunctive relief against any action or attitude that might endanger the existence of the corporation or destruction or loss of valuable property or rights. *Manderson v. Commercial Bank of Pennsylvania*, 28 Pa. St. 379; *Bliss v. Anderson*, 31 Ala. 612, 70 Am. Dec. 511. The combination threatened the forfeiture of the franchise. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *People v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834, 18 Am. St. 843, 9 L. R. A. 33; *United States v. Northern Securities Co.*, 120 Fed. 721. The two companies were competing companies. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

Root, J.—Plaintiff, as the owner of eight shares of the capital stock of the Spokane Falls Gas Light Company (hereinafter called the Spokane company), brought this action, in behalf of himself and all others similarly situated and in behalf of the company, against the defendants, to nullify an arrangement made by some of the defendants while acting as trustees, agents, and majority stockholders in this corporation and another known as The Union Gas Company, whereby, it was alleged by plaintiff, the business and development of the Spokane company were to be stunted, its franchise forfeited, and its business and property destroyed. From a judgment and decree in plaintiff's favor, several of the defendants appeal.

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The trial court made findings of fact which we will set forth in full:

“(1) That the defendant Spokane Falls Gas Light Company is, and has been for more than fifteen years last past, a corporation organized under the laws of the state of Washington, for the sole object and purpose, as provided by its articles of incorporation, of manufacturing and selling illuminating and non-illuminating gas and the residuary products arising therefrom in the city of Spokane Falls (now Spokane), in Spokane county, state of Washington, with the usual powers as to purchasing, erecting and operating gas works and houses, laying mains, etc., under contracts with the said city of Spokane, a municipal corporation and with power to borrow money, issue bonds and other evidences of indebtedness, secured by mortgage upon its entire property, or otherwise, that it has been engaged in such business in the city of Spokane, during all of said time and is now so engaged; that the plaintiff is, and has been for more than two years last past, the owner and holder of eight shares of the capital stock of said corporation; that the total issue of said capital stock is fifteen hundred shares of the par value of one hundred dollars (\$100) each.

“(2) That according to the articles of incorporation the Board of Trustees consists of five members, and at the time of the commencement of this action said Board consisted of the defendants Anderson, Murphy, Twohy, Aldrich and Nicholls; and during the pendency of the said action Aldrich was succeeded by one Gimper; that defendant Murphy was and is president, and at the time of the commencement of the action the defendant Aldrich was secretary and treasurer, and he was thereafter succeeded in said office by said Gimper.

“(3) That the Spokane Falls Gas Light Company is the owner of several valuable pieces of real estate in the city of Spokane and a gas manufacturing plant, with many miles of mains, extensions, surface pipes and appliances usual in the business of manufacturing and supplying pipes and appliances usual in the business of manufacturing and supplying gas; it is also the owner of a franchise from the city of Spokane, referred to in paragraph 3 of the complaint; that prior to the passage of such ordinance said corporation had been acting under another ordinance granted by the city of Spokane, which has expired, and the sole authority of the

corporation for using the streets and alleys of said city for laying and maintaining of mains and pipes is the ordinance described in said paragraph three of the complaint, that said corporation was the only corporation engaged in said gas business in the city of Spokane until the formation of the defendant The Union Gas Company.

"(4) The defendant Spokane Falls Gas Light Company is a prosperous and solvent corporation having no bonded or other indebtedness, except a small sum in the form of bills payable; that its property and assets are worth in excess of the sum of five hundred thousand dollars (\$500,000), and it is making annually a net income over and above all expenses of a sum in excess of thirty thousand dollars (\$30,000).

"(5) That there is an express prohibition in the ordinance referred to in paragraph three of the complaint, against any union or combination of any kind or character between the Spokane Falls Gas Light Company and any other gas company doing business in the city of Spokane, which provision is section 7 of said ordinance, and is as follows, to-wit: 'Sec. 7. If at any time after the acceptance of this franchise by the grantees herein, and before the expiration thereof, the person, association or company operating under this franchise or selling gas thereunder in said city, shall either directly or indirectly, unite or combine with a competing company, institution or person furnishing light in said city, whether such uniting or combining be through the sale of property, or of stock or in any way, an absolute forfeiture of this franchise and all of its terms and provisions shall, at the option of said city, be declared, and a suit for such forfeiture may be brought in a court of proper jurisdiction, and such court may in such suit order and decree said franchise forfeited absolutely to said city. It is the expressed intention of this section to prevent the destruction or limiting of competition in the business of furnishing light to the said city or its inhabitants.'

"(6) That on May 12th, 1904, there was passed by the city council of the city of Spokane an ordinance entitled: 'An Ordinance authorizing Roger H. Williams, his associates, heirs, successors and assigns, to maintain and operate a plant for the manufacture and sale and distribution of illuminating and fuel gas, and their by-products, and to use the streets and

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alleys of the city of Spokane therefor, and providing for the consideration to be paid for said privilege,' which ordinance went into effect in June, 1904, and was accepted by said Roger H. Williams; that by said ordinance said Williams and his assigns, were authorized to erect and maintain and operate a complete plant for the manufacture, sale and distribution of illuminating and fuel gas and their by-products, within the limits of the city of Spokane, and to lay pipes therefor throughout the streets and alleys of said city; that thereafter said Williams, or his associates, erected a plant sufficient for the manufacture of two thousand cubic feet of gas for every twenty-four hours, and have laid several miles of mains thereunder in the streets of said city; that said Williams and his principals caused a corporation to be formed with power to manufacture and sell gas in the city of Spokane under the laws of the state of West Virginia, and the rights, privileges, and authorities granted by said ordinance were assigned to said corporation before the commencement of this action, and there was also transferred to said corporation the manufacturing plant, mains and real estate described above in this paragraph.

"(7) That before the attempted transfer of stock hereinafter referred to, to the defendant The Union Gas Company, at least 1486 shares out of the total issue of fifteen hundred shares of the capital stock of the Spokane Falls Gas Light Company were owned by the defendants N. W. Halsey, Isaac W. Anderson and associates of theirs commonly known as the Halsey Syndicate, which syndicate was controlled by said Halsey and Anderson with plenary powers. A short time after the formation of the corporation The Union Gas Company (which was formed by said Halsey syndicate) and after that corporation had acquired the Williams' franchise and the gas manufacturing plant referred to in the preceding paragraph, the owners of said stock assigned the same to said The Union Gas Company and that corporation took physical possession thereof; that at such time the officers of The Union Gas Company were the agents or representatives of said syndicate and the ownership of a majority of the stock of the Union Gas Company was vested in said syndicate and the business manager thereof was the defendant Anderson and said Roger H. Williams was at all times merely the agent of said syndicate.

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"(8) That the trustees of the Spokane Falls Gas Light Company have no personal interest in said corporation, that they are not stockholders therein, except that each has one share of stock placed in his name on the books of said corporation, of which he is not actually the owner; that each and every member of said board of trustees, and each of the officers of said corporation, is dominated and controlled by the defendant The Union Gas Company, and each and all of them are now acting in the interest of that corporation and are managing the Spokane Falls Gas Light Company for the benefit and advantage and exclusively in the interest of The Union Gas Company, and such was the condition of affairs, at the time of the commencement of this action that it was not incumbent upon the plaintiff to ask the Board of trustees, or any of the officers of the Spokane Falls Gas Light Company to bring this action or take any other steps for the protection of that corporation because so to do would be a vain and useless thing.

"(9) That a short time before the commencement of this action, the defendant The Union Gas Company, executed an instrument in writing in the form of a mortgage running to the defendant United States Mortgage & Trust Company, a corporation organized under the laws of the state of New York and to George M. Cumming, who is a non-resident of the state of Washington and a resident either of New York or some other state on the Atlantic Coast, under which instrument The Union Gas Company attempts to create a lien upon the entire property of that corporation, including the 1486 shares of the capital stock of the Spokane Falls Gas Light Company; that said mortgage purports to secure bonds of the total issue of one million dollars, running for thirty years, bearing interest at five per cent. and it is provided therein that bonds to the amount of four hundred thousand dollars shall be issued at once to pay for the stock in the Spokane Falls Gas Light Company above mentioned; that before the commencement of this action bonds to the amount of four hundred thousand dollars were delivered to defendant Halsey, but none of the same had been sold or delivered to any third parties; that said mortgage, among other things, provides, and in said mortgage The Union Gas Company contracts and covenants, that said stock of the Spokane Gas Light Company, to wit: 1486 shares, shall never be voted

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to authorize any mortgage or other lien upon the property of the Spokane Falls Gas Light Company, unless said mortgage shall be given to the Union Gas Company; and further, that said stock shall never be voted to authorize any increase in the capital stock of the Spokane Falls Gas Light Company for any purpose whatsoever; and further, that said stock shall never be voted to authorize the selling or leasing of the property of the Spokane Falls Gas Light Company to any person or corporation for any purpose or under any circumstances, unless such sale or lease shall be made to The Union Gas Company; that before the commencement of this action said Halsey was offering said bonds for sale in open market; that before the commencement of this action The Union Gas Company had commenced to manufacture gas and had been manufacturing the same for a period of about two weeks.

"(10) That notwithstanding the city of Spokane has been growing with great rapidity and the business of the Spokane Falls Gas Light Company increased to a considerable extent before the formation of The Union Gas Company, and although the older corporation had no bonded or other indebtedness and was a solvent and prosperous concern, nothing was done by the officers of that corporation or permitted to be done by the 'Halsey Syndicate' or The Union Gas Company toward increasing its manufacturing plant, all of which was without excuse. But a few days before the commencement of this action a resolution was passed at a meeting of the so-called Board of Trustees of that corporation authorizing the secretary to enter into a contract with The Union Gas Company, whereby there would be a physical connection between the two plants and whereby the older corporation would purchase gas manufactured in the plant of The Union Gas Company and distribute the same through its mains and sell the same to its customers, and a few days before the commencement of this action such physical connection was made and at the time of the commencement of this action the Spokane Falls Gas Light Company was taking gas from The Union Gas Company and selling the same to its customers; that at that time it was contended by its officers that it was only purchasing from The Union Gas Company such surplus as it needed to supply its customers over and above the gas manufactured in its own plant, but during the pendency of this action for a time ceased without any cause or

excuse to manufacture any gas in its own plant and has been selling to its customers all of the gas manufactured in the plant of The Union Gas Company and manufactured as little gas in its own plant as possible; that no formal contract was entered into and no price was agreed upon; that in making this arrangement The Union Gas Company was represented by the defendant Anderson; that before such arrangement was entered into the plaintiff notified the officers of the Spokane Falls Gas Light Company that such an arrangement would be invalid and that he would protest against the same, and was advised by them that they had no knowledge as to such arrangement being made or contemplated; that in the early part of 1903 said 'Halsey Syndicate,' having purchased more than two-thirds of the stock of the Spokane Falls Gas Light Company, entered upon a scheme to put an end to the life of that corporation and cause its property to be sold to themselves, and in May, 1903, this plaintiff commenced an action to restrain the sale of the entire property of that corporation and to prevent its destruction and annihilation, and after long litigation that action was decided in favor of the plaintiff by the supreme court of this state; that thereafter the said 'Halsey Syndicate' caused said Roger H. Williams to apply for the franchise hereinbefore referred to and entered upon the scheme outlined above, whereby there was issued to themselves bonds to the amount of four hundred thousand dollars, and contracts were entered into and proceedings taken to stunt the older corporation, stop its growth and prevent its enlargement, for the benefit of themselves and the other corporation The Union Gas Company.

"(11) That the franchise, rights and privileges granted to the Spokane Falls Gas Light Company under the ordinance referred to in paragraph three of the complaint, were of great value, and without the privilege of maintaining pipes in the City of Spokane the property of said corporation would be without any practical value whatsoever, and the attempted union or combination between these corporations, in violation of section 7 of said ordinance referred to above, jeopardizes the entire property and assets of the older corporation and subjects said franchise to being forfeited at the instance of the city of Spokane.

"(12) That the United States Mortgage and Trust Company and George M. Cumming have no personal interest in

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said bonds, mortgage or stock and no personal interest in the matter in controversy in this action, but are merely naked trustees under said mortgage or trust deed; that this action is brought on behalf of that defendant the Spokane Falls Gas Light Company and of all other stockholders similarly situated as well as on behalf of the plaintiff.

"(18) That the attorneys of record herein were the attorneys employed by plaintiff to conduct this litigation; that no definite amount of compensation was agreed upon between the plaintiff and his attorneys, but said attorneys were to be paid a reasonable compensation, and such liability to said attorneys has been incurred by plaintiff; that such reasonable compensation for services in this action up to the signing of the decree herein is the sum of twenty-five hundred dollars (\$2,500)."

The following findings were made at the request of defendants:

"That the net earnings of Spokane Falls Gas Light Company have ever since the year 1904 amounted to between \$30,000 and \$40,000 per year, and ever since said time all of said net earnings have been expended by the Spokane Falls Gas Light Company in betterments and improvements of its property in the city of Spokane, principally in mains and meters.

"That said last-named company now has about fifty miles of main in the city of Spokane, and during the year 1906 it built between fifteen and twenty miles of main and paid for same out of its net earnings.

"Said Spokane Falls Gas Light Company does not pay any of its officers any salary except the salary paid to the secretary, who has active charge of the business of the company.

"That under the arrangement between the Spokane Falls Gas Light Company and The Union Gas Company which existed at the time of the commencement of this action, and under which the former purchased gas from the latter, the former company obtained its gas for over twenty thousand dollars less expense per year than it could manufacture same in its own plant, and said two companies have at all times been willing to enter into a permanent contract by which the Spokane Falls Gas Light Company would have the use of all

of The Union Gas Company's mains, and all the gas manufactured by it, during the existence of the franchise of the Spokane Falls Gas Light Company, which has still thirty-eight years to run. And said two companies would have made a permanent contract giving the Spokane Falls Gas Light Company the use of said mains and gas for said length of time had it not been for the opposition of plaintiff and the injunction of this court forbidding the making of a permanent contract between the two companies.

"That the mortgage referred to in plaintiff's complaint herein provides that The Union Gas Company may vote all of the shares of stock in the Spokane Falls Gas Light Company which purport to be covered by said mortgage or pledge therein except that the voting power upon said pledged stock or any of it shall not, in any case or at any time be used or exercised for the purpose of authorizing the creation of any lien or charge upon the properties or franchises of the Spokane Falls Gas Light Co., except to secure the unpaid purchase money of additional property which may be acquired by said last-mentioned company, nor for the purpose of authorizing the sale or lease of the property of the Spokane Falls Gas Light Company except to The Union Gas Company, nor to increase the capital stock of the Spokane Falls Gas Light Co., nor to authorize the creation of any indebtedness except current operating accounts, nor the issue or guarantee of any other obligations or of any bonds by said last-mentioned company; nor the creation of any mortgage or other lien upon the property of said Spokane Falls Gas Light Co. except to The Union Gas Company."

Defendant excepted to many of the findings made by the court upon its own motion or upon the request of plaintiff, and plaintiff excepted to some of those made at the request of defendants. We think, however, that the material findings, except such as are virtually conclusions of law or inferences drawn from other facts found, and excepting those ascribing improper motives or purposes to defendants in the matters mentioned, are fairly supported by the evidence.

In addition to those set forth in the findings, we may mention the following pertinent facts established by the evidence: The franchise of the Union company had a restriction

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similar to that of § 7 of the Spokane company's franchise. This restriction, however, had a proviso in these words:

"Provided, nevertheless, that no merger, consolidation, combination, or union of interests, whether entire or partial between the grantees under this ordinance and the Spokane Falls Gas Light Company, its successors or assigns, shall be prohibited by this ordinance, or be a ground for the forfeiture of any of the rights or privileges hereby granted, but in case of such merger, then the franchise granted to the Spokane Falls Gas Light Company, by ordinance A-1162 passed May 6th, 1902, shall cease and determine; said ordinance No. A-1162 shall be repealed, and said Spokane Falls Gas Light Company and the grantees under this ordinance, shall thereafter operate under the provisions of this ordinance."

When the ordinance granting this franchise was first passed by the city council, it was vetoed by the mayor, one of the grounds for his disapproval being that the recipient or user of the franchise was not to be a competitor of the Spokane company. The city council then passed the ordinance over the mayor's veto. It was shown that the rapid growth of the city of Spokane had occasioned a demand for gas in excess of the amount which the Spokane company was capable of producing without expensive repairing and costly enlargement of its plant; that the making of these betterments would have necessitated the incurring of a heavy indebtedness by the company; that the manufacturing plant was near the center of the city where the land necessary to be purchased for an increase in the size of the plant was very expensive; that the Union company never sold or supplied any gas to any one except the Spokane company. Upon the findings the trial court made conclusions of law and, in accordance therewith, entered a decree, in substance that the Spokane company and The Union Gas Company, their officers, agents and servants be perpetually enjoined from making and continuing the physical connection between the two plants; that the existing physical connection be severed, and that the Spokane company, its officers, agents and servants, be perpetually enjoined

from purchasing, taking, using, or selling any gas manufactured in the plant of The Union Gas Company and from making or permitting any combination, union, or consolidation with The Union Gas Company, or with its plant or properties; that the Spokane company, its officers, agents, and servants, be perpetually restrained from recognizing the transfer of stock to The Union Gas Company, from permitting it or any agent, servant, assignee, "or trustee thereof from voting any such stock," "from permitting any pledgee or assignee of a pledgee under any mortgage or contract executed by The Union Gas Company" to vote any such stock and from paying dividends thereon to any such person; and further that The Union Gas Company and the United States Mortgage and Trust Company, their officers, agents, servants and trustees and all claiming under them be enjoined from so voting or attempting to collect any dividends; provided, that The Union Gas Company or its pledgee might sell the stock if sold to a person in no manner representing The Union Gas Company; that the Spokane company should only recognize the holders of stock not falling within the previously stated prohibitions, and that a decision of the majority of the voting stock permitted to vote should control on all questions; that the plaintiff recover from the defendant, the Spokane company, in addition to its costs and disbursements, an attorney's fee of \$2,500; that the defendants should not be required to sever the physical connection existing between the plants of the two companies, nor the Spokane company to cease using and selling gas manufactured in the plant of The Union Gas Company, for the period of nine months from the date of the decree, and that if the defendants should within ten days take an appeal to this court that then the defendants should not be required to discontinue the physical connection nor cease using and selling gas manufactured in the plant of The Union Gas Company until the expiration of nine months after the decision of this court and the filing of the remittitur from this court with the clerk of the court below.

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In the able and elaborate briefs of counsel for the respective parties, many questions are discussed that will not require discussion by us. They are all involved in, or subordinate to, what we conceive to be the paramount question of the case, to wit: Does the arrangement entered into by the officers of these two corporations constitute an illegal combination, or amount to a fraud upon respondent as a minority stockholder in the Spokane company, or infringe his rights, or unlawfully destroy or lessen the value of his property as such stockholder? Respondent urges that § 7 of the franchise of the Spokane company forbids any arrangement such as was made by these two companies, and provides a forfeiture of the franchise therefor, at the option of the city; that the franchise is very valuable, and that its liability to forfeiture can be obviated only by a disavowal on the part of the stockholders of the company. Appellants urge that § 7 does not forbid such an arrangement, that it forbids any combination with a "*competing company, institution, or person furnishing light in said city,*" but that the Union company is not a "*competing*" company, never was, and did not intend to be when it secured its franchise, and has never furnished light to any one except the Spokane company. They maintain that a "*competing*" company is one that competes; that was intended to compete. Besides the dictionary definition of the term, they cite *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; Eddy, Combinations, § 190; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691; *Moores & Co. v. Bricklayers' Union*, 23 Weekly Law B. 48, 10 Ohio Dec. 665; *Kimball v. Atchison etc. R. Co.*, 46 Fed. 888. Respondent argues that the expression "*competing company,*" as found in the ordinance, means any company having the power to compete, and cites in support thereof *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup Ct. 714, 40 L. Ed. 849.

Assuming, without deciding, that these are competing companies, we will pass to the question of whether the franchises of the two companies construed together, or that of the old, inter-

preted in the light of the new, forbids such a combination or arrangement as was here made. Section 8½ of the ordinance granting the franchise to the Union company expressly authorizes this company to merge, consolidate, or combine, wholly or partially, with the Spokane company. Appellants maintain that if the Union company is so authorized to do, it necessarily follows that the Spokane company is likewise authorized. Respondent disputes this. He refers to the wording of § 8½, where it says no combination, etc., "shall be prohibited by *this ordinance*, or be a ground for a forfeiture of any of the rights or privileges *hereby granted*," and calls special attention to the words above italicized, insisting that said words indicate a limitation and exclude the idea that there was any intention to waive or modify the restrictions in § 7 of the Spokane company's franchise.

We are constrained to differ with respondent as to the construction to be placed upon the language of the two sections under consideration. The Union company's franchise was passed long after that of the Spokane company. Hence, if there be such a conflict or inconsistency in the provisions of the two as calls for the yielding of those in one or the other, those of the older ordinance must give way. Section 7 in the franchise of the old company absolutely forbids any combination with any competitor and prescribes forfeiture as a penalty. Section 8½ of the new company's franchise has the same restriction, followed, however, by a proviso expressly authorizing such combination with the old company. It is conceded that the new company was given the power by its franchise to make a combination with the old company. This being conceded, how can it be said that the old company was not thereby permitted to enter such a combination with the new company? Suppose the legislature should by statute provide that no white man should marry an Indian woman, and suppose the next session of the legislature should enact that every Indian woman was authorized to marry a white man. Would not the latter statute repeal the former? Or

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suppose the legislature should forbid merchants from selling firearms to minors, and at a subsequent session should enact a law saying that boys over eighteen were authorized to purchase firearms of any merchant. Would there be any doubt that the former statute was modified in so far as it applied to boys over eighteen? So, in this case. When the city council by ordinance gave the new company permission to make a combination with the old company, it impliedly authorized the latter to participate in that combination. The very fact of combination necessarily involves co-operation. It would seem to involve an absurdity to say to the new company, "You may combine with the old company, but it cannot combine with you." A corporation cannot combine with itself, nor can it combine with another without co-operation on the part of that other. By the enactment of the ordinance giving the Union company authority to combine with the Spokane company, the city authorized the latter to enter and be a party to such combination, or at least estopped itself from asserting a forfeiture on account thereof. *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *Commercial Elec. L. & P. Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592; *Fox v. Harding*, 61 Mass. 516; *Farlow v. Ellis*, 81 Mass. 229; 29 Am. & Eng. Ency. Law (2d ed.), 1095, 1103; 16 Cyc. 749, 781-2; 8 Current Law, 1075.

It is not contended, as we understand, that a merger has occurred. In case of merger, it is provided that both companies may act under the terms of the franchise granted the Union company. If the trustees and majority of the stockholders deemed it best for the company to exchange its franchise for that of the new company, we know of no reason why they would not have power to so do in the absence of fraud or unfairness. *Symmes v. Union Trust Co.*, 60 Fed. 830.

The two companies having the right to combine, did the arrangement made infringe the legal rights of respondent? It is urged that the Spokane company had no power to pur-

chase gas; that in doing so it was acting *ultra vires*. A corporation being an intangible creature must act through agencies. This company could hire a man or men by the day, week, or month to manufacture the gas which it was to distribute and sell. If it could pay by the day or week or month for having its gas made, we see no reason why it could not pay by the cubic foot. If it could furnish the material and plant and pay its workmen so much per cubic foot for the gas manufactured, we do not see why it might not with propriety hire men or another company to supply the material and plant or some portion thereof, and pay by the cubic foot for the gas made and delivered to it. It is urged that this is a public service corporation and that the public has an interest in having the company exercise its functions, one of which is to manufacture the gas it sells. The public is not a party to this suit; but if it were, it would doubtless be a sufficient answer to say that the public is principally interested in the results rather than the methods of the furnishing to it of gas. If the right quality of gas is supplied to the people at a reasonable price when and where it should be, the public is not ordinarily concerned as to where the supplying company obtains the gas. Matters of price, quality and quantity concern consumers much more than source of supply. We think the old company had authority to purchase from the new any gas it deemed necessary or advisable, so long as it did not pay too much therefor, and there is no question of that kind here.

Appellants contend that the general powers to "purchase . . . real and personal property," conferred by Bal. Code, § 4253 (P. C. § 7058), authorize the purchase of gas by this company. Appellants in their brief claim to have offered to file a supplemental answer setting forth that the articles of incorporation of the Spokane company had been amended so as to expressly authorize it to purchase gas. We find such a supplemental answer in the record and also objections by respondent to its being filed. The record does not seem to show any ruling of the court, but appellants' reply

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brief says that the court did not permit it to be filed, for the reason that the old company had ceased to purchase gas during the litigation. Respondent seems not to have pleaded—at least, not otherwise than inferentially—that the purchasing of gas was *ultra vires*.

Respondent contends that the entire purpose of the arrangement complained of by him was to stunt the business and prospects of the Spokane company and build up the Union company. The Spokane company's capital stock consists of fifteen hundred shares. Respondent owns only eight of these. Practically all of the other stock belongs to these defendants. Under the arrangement made, it would seem that about the only revenue the new company would receive would be from dividends on the stock of the old company. In all dividends declared by the latter company, respondent would share proportionately with other stockholders. The court found that, under the arrangement made, the old company was obtaining its gas "for over twenty thousand dollars less expense per year than it could manufacture same in its own plant," and that the two companies had at all times been willing to enter into a permanent contract to continue this arrangement and would have done so had they not been enjoined in this action from so doing. As the franchise had thirty-eight years yet to run, this would amount to a saving of over \$760,000 to the company during that period.

The court also made a finding that the company paid no salary to its officers except the secretary, and there is no claim of any extravagance in the matter of management. In the face of an economical administration of its affairs and of a saving as above mentioned, it would seem to require some clear showing of unfairness, discrimination, or disregard of legal or equitable rights before such control in the hands of the owners of fourteen hundred and eighty-six shares of the capital stock should be overturned by a court at the request of a holder of only eight shares. Respondent's argument that this arrangement permits the Spokane company to become stunted seems

to imply that the company should repair and enlarge its plant so as to meet the growing needs of the public for gas; that the officers of the company instead of making this arrangement with the new company should have repaired and increased the capacity of the old company's plant. To have done this would have required a large sum of money. The company did not have that money. It is said that it could readily have borrowed the necessary funds. Can a minority stockholder insist upon the trustees creating an indebtedness to enlarge the business of the corporation as against the wishes of the majority, unless it be possibly in a rare case of extreme emergency where such enlargement is necessary to save its corporate life, or preserve its property from threatened and imminent destruction? The business policy of a corporation must be determined by the majority of the shareholders. Corporations could not do business on any other basis. Respondent knew that there were fifteen hundred shares of capital stock. It may be presumed that both respondent and appellants paid for every share of stock so held respectively. Respondent had the right to have the business and property of the corporation managed as by law required, and to have the same protected against illegal, wanton, or wasteful acts on the part of the majority; but, as a minority stockholder, there came no privilege to him to demand that the capital stock should be increased, or that the property of the corporation should be mortgaged or otherwise encumbered in order that the company might do more business and perhaps earn more dividends upon its stock. There might have been, and probably was, a difference of opinion as to the advisability of incurring the indebtedness necessary to enlarge the plant. The officers of the company, acting pursuant to the wishes of the majority of the stockholders, deemed it advisable to purchase its gas from the new company instead of enlarging the old company's plant. We are unable to see why this was not a discretionary matter with them. As to whether or not an increase in the capacity of the plant was an improvement,

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justifying an outlay of money and the creating of a large indebtedness, was a business proposition for the determination of the board or the majority of the stockholders. That their opinion and action in relation thereto was not in accord with respondent's views as to what was expedient, or for the best interest of the company, is not sufficient justification for a court of equity to stay their hand.

In discussing the proposition that a minority of stockholders cannot question an act *intra vires* of the majority, 2 Cook on Corporations (5th ed.), § 684, says:

"The discretion of the directors or a majority of the stockholders as to acts *intra vires* cannot be questioned by single stockholders unless fraud is involved.—This proposition of law is clearly, firmly, and very properly established beyond any question. Were the rule otherwise there would be no safety or possibility of carrying on business through corporations. There would be suits instituted by dissatisfied stockholders on slight provocation, and sometimes for the very purpose of embarrassing the transaction of business. A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. . . . A court of equity cannot, however, restrain the corporation from proceeding with business and using its funds for that purpose, even though a minority of the stockholders show that sound business discretion and judgment would dictate a different policy."

In the case of *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68, the court said:

"Lastly it is urged that the manner in which the conversion plan is to be carried through and consummated is illegal, and furnishes sufficient ground for retaining the injunction. 'Individual stockholders cannot question, in judicial proceedings, corporate acts of directors, if the same are within the powers of the corporation and in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment.' *Ellerman v.*

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Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287. To the same effect are the cases of *Benedict v. Construction Co.* 49 N. J. Eq. 23, 23 Atl. 485, and *Edison v. Phonograph Co.*, 52 N. J. Eq. 620, 29 Atl. 195. The action challenged in the case sub judice is that of the directors, fortified and upheld by the approving vote of more than two-thirds of the shareholders. The plan was adopted by the requisite vote with full knowledge of its purport, communicated in the circular letter accompanying the call of the stockholders' meeting, and therefore, in the absence of fraud, it is not the province of this court to substitute its judgment for that of the directors and shareholders, and declare that a less expensive or more beneficial plan could have been resorted to successfully."

In *McMullen v. Ritchie*, 64 Fed. 253, a case where a minority stockholder alleged fraud and conspiracy, the court, in speaking of the acts complained of, said:

"They all concern the management or policy of the company's assets. They do not involve acts *ultra vires* done or threatened, or acts of gross negligence in protection of corporate property, or acts involving a misappropriation of corporate assets. Mr. Ritchie's judgment was in conflict with the judgment of the board as to what was best to be done. They were questions of expediency as to measures of corporate interest. They present a case where it is sought to have the business judgment of the directory overruled, and the judgment of Mr. Ritchie enforced, through an appeal to the courts. I know of no rule of law which will justify an interference in regard to such matters by a court of justice."

See, also, *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; *Ellerman v. Chicago Junction R. etc. Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17; *Leslie v. Lorillard*, 110 N. Y. 519, 18. N. E. 363, 1 L. R. A. 456; *North American Land & Timber Co. v. Watkins*, 109 Fed. 101.

It is urged that the old company is "bound hand and foot" and absolutely dominated by the new company. Every corporation is bound to and dominated by the will of the majority stockholders; but so long as this domination is not

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exercised unlawfully or inequitably, courts are powerless to interfere. To maintain an action like this for injunctive relief, it must ordinarily appear that the complaining minority stockholder is suffering some pecuniary or other substantial injury as a result of the illegal, reckless, or discriminatory conduct of the majority. As a rule, the bare possibility of damage or wrong is not sufficient. There must usually be a present or threatened and probable danger. The statutes of our state permit one corporation to own shares of the capital stock of any other corporation, and to exercise the same powers over such shares as any other owner might. Laws 1905, p. 51. Hence, the Union company could legally own and control the majority of the shares of stock of the Spokane company and shape its policy, so long as such ownership and control was not exercised in a manner that would be unlawful or unjustifiable if by a natural person or persons. It is not meant by this that a corporation controlling the majority of the stock of another corporation can so manipulate it as to work a fraud upon, or discriminate against, the minority shareholders thereof, either directly or indirectly, or by any kind of subterfuge. There are certain implied obligations due to and from every shareholder. The majority holders cannot avoid those resting upon them, nor ignore those due the minority, whether such majority be natural persons or a corporation. In this case we do not find respondent's rights to have been ignored or unlawfully circumscribed. We find no illegal or other action on the part of appellants justifying the intervention of a court in respondent's behalf. Bearing upon these questions we may cite: *Gray v. Manhattan R. Co.*, 128 N. Y. 499, 28 N. E. 498; *Barr v. Pittsburg Plate Glass Co.*, 57 Fed. 86; *Pender v. Lushington*, L. R. 6 Ch. D. 70; *Rothchild v. Memphis etc. R. Co.*, 113 Fed. 476; *Wheeler v. Pullman Iron & Steel Co.*, 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619; *Price v. Holcomb*, 89 Iowa 123, 56 N. W. 407; *Rand*,

McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77;
Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186.

The judgment and decree of the honorable superior court is reversed, and the case remanded with direction to dismiss the action.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

RUDKIN, J. (dissenting).—The attempt on the part of the appellants to circumvent the judgment of the court in *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004, is so apparent that I feel constrained to dissent.

DUNBAR, J., concurs with Rudkin, J.

[No. 7164. Decided May 29, 1908.]

EVA HOLCOMB, *Respondent*, v. AUGUSTUS H. HOLCOMB,
*Appellant.*¹

COURTS—JURISDICTION—APPELLATE COURTS—DIVORCE—ALIMONY PENDING APPEAL. The supreme court has original jurisdiction to entertain an application for temporary alimony, attorney's fees and suit money pending an appeal from a judgment of divorce in favor of a wife, under the statutes requiring a trial *de novo* on appeal and declaring that the supreme court shall be possessed of the whole case as fully as the trial court was, and under Const. art. 4, § 4, giving the supreme court power to issue all writs necessary and proper to the complete exercise of appellate and revisory jurisdiction (MOUNT, RUDKIN, and FULLERTON, JJ., dissenting).

DIVORCE—ALIMONY—SUIT MONEY—PENDING APPEAL. A proper case for the allowance of suit money and alimony pending appeal is shown where the wife secured a judgment of divorce, with alimony, which was superseded on the husband's appeal from the allowance of alimony, and the wife was without means of support for herself and child.

DIVORCE—SUIT MONEY PENDING APPEAL. In fixing suit money and attorney's fees pending appeal in a divorce case, the supreme court

¹Reported in 95 Pac. 1091.

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will grant only a fair amount for necessary expenses, leaving the ultimate amount of the attorney's fees to the final adjudication of the case.

NE EXEAT—GROUNDS—SHOWING—SUFFICIENCY—DIVORCE. A writ of *ne exeat* preventing an appellant in a divorce case from leaving the state pending the appeal will not be granted, in the absence of a sufficient showing that he is about to do so, and where he has given a supersedeas bond on appeal, and much of the property involved is real estate which cannot be conveyed without consent of the wife.

Application filed in the supreme court January 3, 1908, for an order directing the allowance of attorney's fees, suit money, and alimony pending an appeal from a judgment of the superior court for King county, Yakey, J., entered December 2, 1907, granting a divorce to the plaintiff. Granted.

Herbert E. Snook, for appellant.

Bo Sweeney, for respondent.

Root, J.—This is an application by respondent to this court in a divorce proceeding, (1) for an allowance of alimony *pendente lite*, for the support of the respondent and her minor child; (2) for an allowance of attorney's fees and expense money to enable her to properly present her case in this court upon the appeal taken herein; (3) for a writ *ne exeat*, restraining and prohibiting the defendant from leaving the state of Washington without the order of this court, and that he be required to give bonds to insure his obedience to the orders of the court; (4) for an order or decree making the alimony a first lien on any and all property of appellant.

The application presents the question of the power of this court to grant alimony, attorney's fees, and suit money pending an appeal of a divorce proceeding in this court. Bal. Code, §§ 5722, 5723 (P. C. §§ 4636, 4637), reads as follows:

“§5722. Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and

such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor.

“§ 5723. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.”

A portion of Bal. Code, § 5730 (P. C. § 4641), reads as follows:

“When either party shall signify a desire to appeal from any of the orders of the court, in the disposition of the property or of the children, the court shall certify the evidence adduced on the trial, and the supreme court shall be possessed of the whole case as fully as the superior court was, and may reverse, modify, or affirm said judgment, according to the real merits of the case.”

Under § 5723 it is conceded that the trial court has power in all proper cases to allow alimony, suit money, and attorney's fees pending the litigation in that court. That portion of § 5730 which says, “and the supreme court shall be possessed of the whole case as fully as the superior court was,” would seem to imply that the appellate court should, upon the appeal, be vested with every power concerning the parties and the property which was possessed by the trial court during the pendency of the case in that court.

But it is suggested that, under the state constitution, such power is not vested in this court. Where the parties by their pleadings bring before the trial court their property, that court is by § 5722 given express authority to dispose of it

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during the pendency of the action "as may be deemed right and proper." Hence, during that time, the property is practically *in custodia legis*. Section 5723 requires the court, upon granting a divorce, to dispose of the property "as shall appear just and equitable." If an appeal is taken and the decree superseded, where is the control of the property then vested? It could not go absolutely to the appellant, but would be there subject to just such limitations as existed immediately before the decree was entered. That would be the natural effect of the stay bond. It would seem that the power over the property, given by § 5722, would then pass to the appellate court, and should be exercised by that court as an incident to its appellate jurisdiction, essential to the administration of justice in such cases, although possibly it might also be exercised by the trial court in providing for the maintenance of the wife and for the preparation and presentation of her case on appeal; a question, however, that we do not now decide. We think it may be deemed such an incident to the exercise of the appellate and revisory jurisdiction of this court in a case like this at bar, for two reasons: (1) because the state is an interested party in every divorce case, and public policy forbids that the issues in such a case should be adjudicated when the wife, by reason of the withholding of her property by the husband, is unable to appear or be heard concerning the rights of herself and minor children; (2) because she, being a joint owner in the property which by §§ 5722 and 5723 is made subject to the control *pendente lite* and to the disposition finally of the court, is entitled, both as a matter of right and public policy, to such an allowance from the property as will sustain her during the litigation and enable her to be heard before both the trial and appellate courts as to her claims and rights involved in the litigation.

A divorce case is tried in this court *de novo* upon the record and evidence brought from the trial court. In the consideration and determination of the case, we must consider not only the interests of the husband and wife, but also the interests

of the state and society generally and of the minor children of the parties. The peculiar character of a divorce proceeding is such that both justice and public policy demand an opportunity for the wife to be present or heard before her property and other rights are passed upon by the appellate court. The law cannot consistently say to her: "You must support yourself during this litigation and defend the interest of yourself, children, and the state, appear on this appeal and pay all expenses for preparing and presenting your case," and then add: "But you will not be allowed any of your money or other property, tied up herein, with which to meet such demands, even though your inability to appear results disastrously to the interests of yourself, your infant child, and the state." We do not think our constitution and statutes demand a construction producing such an incongruity. To say that the law requires the wife to do something which the law makes it impossible for her to do, is to assert a proposition to which we cannot accord legal sanction. We think this court has the power to exercise its jurisdiction so as not to give recognition to such a doctrine. Where, as in this case, there is a considerable amount of community property involved, all of which is tied up by a stay bond on appeal, we think this court has the power, incidental to its appellate jurisdiction, to award from such property a sufficient amount to support the wife and minor child and to properly present her case herein. We think such power is contemplated in § 4 of art. 4, of the State Constitution, where it says: "The supreme court shall also have power to issue . . . all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."

While upon the general proposition as to an appellate court having this power, there is some conflict in the authorities, we believe the weight of authority sustains the affirmative of the proposition. *Bachelor v. Bachelor*, 30 Wash. 203, 71 Pac. 193; *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. 923; *Chaffee*

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v. *Chaffee*, 14 Mich. 462; *Goldsmith v. Goldsmith*, 6 Mich. 284; *Hall v. Hall*, 77 Miss. 741, 27 South. 636; *Prine v. Prine*, 36 Fla. 676, 18 South. 781, 34 L. R. A. 87; *Lake v. Lake*, 17 Nev. 230, 30 Pac. 878; *Van Voorhis v. Van Voorhis*, 90 Mich. 276, 51 N. W. 281; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414; *Disborough v. Disborough*, 51 N. J. Eq. 306, 28 Atl. 3; *Callahan v. Callahan*, 7 Neb. 38; *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766; *Pollock v. Pollock*, 7 S. D. 331, 64 N. W. 165; *Pleyte v. Pleyte*, 15 Colo. 125, 25 N. W. 25; *Day v. Day*, 84 Iowa, 221, 50 N. W. 979; *Weishaupt v. Weishaupt*, 27 Wis. 621; *Krause v. Krause*, 23 Wis. 354; 2 Bishop, Marriage & Divorce, §393; 14 Cyc. 745, 750, 766; 1 Ency. Plead. & Prac. 448, 449; 2 Am. & Eng. Ency. Law (2d ed.), 110; *Clarkson v. Clarkson*, 20 Mo. App. 94. As to the power of the trial court to make this allowance after appeal has been taken, see, also, *McBride v. McBride*, 119 N. Y. 519, 23 N. E. 1065; *Miller v. Miller*, 43 Iowa 325; *Rohrback v. Rohrback*, 75 Md. 317, 23 Atl. 610; *State ex rel. Dawson v. St. Louis Court of Appeals*, 99 Mo. 216, 12 S. W. 661; *Storke v. Storke*, 99 Cal. 621, 34 Pac. 339; *Reilly v. Reilly*, 60 Cal. 624; *Peavey v. Peavey*, 76 Iowa 443, 41 N. W. 67; *Jenkins v. Jenkins*, 91 Ill. 167; *Ex parte King*, 27 Ala. 387; *Ross v. Griffin*, 53 Mich. 5, 18 N. W. 534.

While we are of the opinion that this court has the power to award suit money, attorney's fees, and alimony *pendente lite* in this court, we believe its jurisdiction over these matters should be exercised with much care and discretion, and an award made only where the demands of justice make it clearly essential. In the case at bar the respondent obtained a decree of divorce in the trial court from appellant, and the property, mostly or all having been community in character, was by the decree divided between the parties. An allowance of \$50 per month alimony was awarded to respondent by the final decree. The property allowed to respondent was not income producing

property. The defendant appealed from that portion of the decree disposing of the property and awarding the alimony. The respondent is, and for many years has been, a cripple. A young child of the parties was awarded to the care and custody of the mother. The allowance and award not being available by reason of the supersedeas bond, and it being made to appear that respondent has no property of her own and no means of adequate support for herself and child except from friends, we think this is a proper case for the allowance of suit money, attorney's fees, and alimony *pendente lite*. In fixing the amount of suit money, the court will be guided by what it conceives to be a fair amount for printing briefs, meeting docket fee and other expenses incidental to the presentation of respondent's case in this court. In fixing the amount of the attorney's fees, the court will not be guided by what it deems to be adequate compensation for the services of an attorney for respondent in preparing respondent's case and appearing in this court. Those matters, together with the final determination of the question of alimony or other allowance and disposition of property, will be taken into consideration at the final adjudication of the case. At present this court will only allow such amount as we think will enable respondent to secure the legal services necessary to properly represent her interests upon the appeal.

It is the order of the court that appellant be, and he is hereby, directed to pay to the respondent, for the support of herself and minor child, the sum of \$50 per month from the date of the supersedeas bond until the filing of the opinion and decision of this court upon the merits of the case, said allowance to be paid on the first business day of each and every month. It also ordered that appellant be, and he is hereby, ordered and directed to pay to respondent, or to her attorney of record, the sum of \$50 as suit money, and the further sum of \$100 as attorney's fees. That part of the application asking for a writ of *ne exeat* will be denied. We do not think there is any sufficient showing that the appellant is about, or

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threatening, to leave the jurisdiction of the court; and in view of the fact that a considerable portion of the property is real estate which it would be difficult for him to pass title to without the consent of respondent, and having in mind also the stay bond, we do not think that an order or writ of this kind is justified. As to an order making the award of alimony a first lien upon appellant's property, there is some question as to whether this court has power so to do, other than as its order allowing the alimony may thus impress the property, a question, however, that we are not called upon to decide at this time. We will decline to make any order concerning this branch of the application.

The order made herein will be in effect from the time of the filing of this opinion.

HADLEY, C. J., DUNBAR, and CROW, JJ., concur.

MOUNT, J. (dissenting).—I dissent. The constitution of this state invests the superior courts with "original jurisdiction in all cases . . . of divorce and for annulment of marriage." Section 6, art. 4, Constitution, and the section of the statute quoted in the majority opinion, Bal. Code, § 5722 (P. C. § 4636), authorizes the judges of such courts to make such orders for the expenses of such actions as will insure to the wife an efficient preparation of her case, etc. The constitution gives this court appellate jurisdiction in this class of cases. Its original jurisdiction is limited to certain named writs and "to all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." Const., art. 4, § 4. This is an original application to this court for an order for attorney's fees, suit money, and alimony in a case pending here upon appeal. Affidavits are filed here in support of the application. In order to allow applications of this character we must determine facts which in most cases will be disputed by original evidence. In other words, this court must exercise original jurisdiction. *Reilly v. Reilly*, 60 Cal. 624; *Hunter v. Hunter*, 100 Ill. 477; *Kesler v. Kesler*, 39 Ind. 153; *State*

v. *St. Louis Court of Appeals*, 88 Mo. 135. No jurisdiction is conferred by the constitution, and even if the legislature has authority to confer it upon this court, which is subject to much doubt, it has not done so nor attempted to do so. It is true while the case is pending here on appeal this court is "possessed of the whole case as fully as the superior court was, and may reverse, modify or affirm the judgment." This, of course, refers only to the appellate capacity of the court. It is also true "that a divorce case is tried in this court *de novo* upon the record," as all equity cases and cases tried by the court without a jury are triable here; but it has not been supposed until now that this court may go outside of that record, receive new evidence, and find facts possibly at variance with the record on appeal, and make or enforce orders which require the exercise of original jurisdiction in advance of the hearing of the case upon its merits.

In my opinion this court is assuming jurisdiction in this matter in violation of the constitution, which confers only appellate or revisory powers upon it. If an order of the trial court granting attorney's fees, suit money, and alimony may be superseded and thereby the property of a party rendered unavailable, the hardship created thereby is the result of legislation the remedy for which is in the legislature. Many cases appealed here present hardships which we are powerless to avoid. The mere delay of an appeal frequently prevents a party from receiving money to which he is immediately entitled and which may be necessary for food for himself or family: but he must content himself with interest on his judgment pending the delay. These considerations are not sufficient to authorize this court to usurp legislative functions or to change the plain mandate of the constitution that the jurisdiction of this court is appellate only.

The power of this court to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction does not, in my opinion, authorize the order made by the majority in this case. That provision applies to a case

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where some action is necessary to compel some officer to perform a legal duty such as preserving the status of the property or of the parties, or of preserving or completing the record, or some other such action. In order that this court may exercise its appellate jurisdiction. No such writ is sought here. It is not claimed that one is proper. I think the majority would probably deny such a motion in any other case than a divorce case, and yet the clause of the constitution under discussion may be applied to any other case upon the same reasoning invoked in this.

Some of the cases cited by the majority sustain the conclusion reached in this case, upon the ground that divorce cases are a class requiring such action; but where the superior court or court of original jurisdiction is authorized to make provision for the wife, and where this court has no original jurisdiction in such cases, it seems to me such cases on appeal should be treated as other appealed cases. In the divorce case out of which this application arises, the trial court entered a final judgment and, among other things, awarded the plaintiff \$50 per month alimony. The trial court refused to fix the amount of a supersedeas bond on appeal, and this court, upon an application, issued a writ requiring the trial court to do so, and the judgment was superseded. *State ex rel. Holcomb v. Yakey*, 48 Wash. 419, 93 Pac. 928. This court now makes an original order requiring the payment of the same amount as alimony. This is a fair sample of results sure to follow, and real difficulties are in store if we assume original jurisdiction in this class of cases.

RUDKIN and FULLERTON, JJ., concur with MOUNT, J.

[No. 7338. Decided May 29, 1908.]

ELLA A. SULLIVAN, *Respondent*, v. DANIEL SULLIVAN,
*Appellant.*¹

COURTS—JURISDICTION—APPELLATE COURTS—DIVORCE—ALIMONY PENDING APPEAL. The supreme court has original jurisdiction to entertain an application for temporary alimony, attorney's fees and suit money pending an appeal from a judgment of divorce in favor of a wife, under the statutes requiring a trial *de novo* on appeal and declaring that the supreme court shall be possessed of the whole case as fully as the trial court was, and under Const. art. 4, § 4, giving the supreme court power to issue all writs necessary and proper to the complete exercise of appellate and revisory jurisdiction.

DIVORCE—SUIT MONEY PENDING APPEAL. In fixing suit money and attorneys fees pending appeal in a divorce case, the supreme court will grant only a fair amount for necessary expenses, leaving the ultimate amount of the attorney's fees to the final adjudication of the case.

DIVORCE—ALIMONY—SUIT MONEY—ALLOWANCE PENDING APPEAL. A sufficient showing is made for the allowance of alimony and suit money to a wife, pending the husband's appeal from a judgment disposing of community property, where he has control of a substantial amount of property and the wife is without means of support for herself and minor children, or for legal services.

SAME—ALIMONY—AMOUNT. A wife who has been granted a divorce will, pending appeal, be allowed \$100 per month alimony, and \$150 per month for the care of a sick child, where it appears that the husband has possession of property of the value of over a quarter of a million dollars, and the wife is necessarily in another state for the treatment of the child under the care of a physician.

MOUNT, RUDKIN, and FULLERTON, JJ., dissent.

Application filed in the supreme court April 18, 1908, for an order directing the allowance of suit money, attorney's fees, and alimony, pending an appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 18, 1908, granting to the plaintiff a divorce. Granted.

Million, Houser & Shrauger, for appellant.

Smith & Brawley, for respondent.

¹Reported in 95 Pac. 1095.

May 1908]

Opinion Per Root, J.

Root, J.—This is an application by the respondent, in a divorce case on appeal to this court, for the allowance of suit money, attorney's fees, and alimony *pendente lite* in this court. The power of this court to make such allowance to the wife upon appeal in such proceeding has been passed upon in the case of *Holcomb v. Holcomb*, *ante* p. 498, 95 Pac. 1091. From respondent's application it appears that appellant has under his control property of the value of at least \$224,000, much of it being, or having been, community property, and of which \$7,000 is in actual cash in the bank, subject to his check or order. It further appears that the respondent has the care and custody of their minor child, afflicted with tuberculosis of the lungs, by reason of which she is at present under the physician's care in the state of California, where it is necessary to have with her an older sister or this respondent, and for whose expenses it is necessary that a considerable amount of money shall be available regularly; that the respondent has no property in her possession or under her control, and no means of supporting herself or minor child; that the lower court awarded respondent a decree of divorce and a substantial portion of the property, which said decree has, however, been superseded by a stay bond interposed by appellant when this appeal was undertaken; that it is necessary for her to have money to meet the ordinary expenses incurred in preparing or having prepared her case for consideration in this court, and to hire the legal services necessary therefor. It states that it is necessary for her to be awarded for herself the sum of \$200, for her children the sum of \$150 per month, for suit money \$100, and as attorney's fees \$2,500.

Where the wife prevails in the trial court and there is belonging to the parties a substantial amount of community property which is in the possession and under the control of the husband, and the disposition thereof made by the trial court is superseded by the husband's stay bond on appeal, and the wife has no means of support for herself and minor children and for legal services and charges incidental to properly

preparing and presenting her case upon appeal, we think a sufficient showing is made for an allowance for these purposes by this court. As to the amount of attorney's fees to be allowed herein, we are not called upon at this time to say what the value of the services of respondent's attorneys in representing her interest in this court might be, or to say what proportion, if any, of their fees should be paid by the appellant or from the community property. It is for us to allow at this time merely what we think is necessary to enable her to secure suitable legal services for the preparation and presentation of her case, leaving the question as to the value of such services and the manner of their being paid in full to the final determination of the case.

It appears that certain allowances for alimony and suit money amounting to \$500 were made in the trial court. It is the order of this court that the appellant be, and he is hereby, directed to pay to the respondent, for her use, the sum of \$100 per month, and for the use and benefit of the minor child the sum of \$150 per month, all payable to respondent on the first business day of every month, said allowance computed from the date of the filing of the supersedeas bond until the filing of the opinion of this court upon the determination of the case upon the merits. It is further ordered that appellant, within ten days from the filing of this opinion, pay to respondent or her attorneys the sum of \$75 as suit money, and the further sum of \$150 as attorney's fees. The orders herein made shall be in full force and effect from and after the filing of this opinion.

HADLEY, C. J., DUNBAR, and CROW, JJ., concur.

MOUNT, RUDKIN, and FULLERTON, JJ., dissent.

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Opinion Per Root, J.

[No. 7376. Decided May 20, 1908.]

JAMES CROWLEY, SENIOR, *et al.*, *Plaintiffs and Appellants*, v.
GEORGE TAYLOR, *Defendant and Appellant*.¹

TRIAL—CONDUCT OF JUDGE—COMMENTS. The statement in an instruction to a jury that this is an action to recover money lost at gambling is not an unlawful comment on the evidence.

APPEAL—REVIEW—HARMLESS ERROR. Where one of two defendants defaults, it is not prejudicial error to instruct the jury that he failed to answer and defaulted.

SAME—INSTRUCTIONS—GAMING. In an action to recover money lost at gambling, the defendant cannot complain on appeal that the jury were restricted to the consideration of gambling at a certain place, as it was error favorable to appellant.

GAMING—DEFENSES—OWNERSHIP OF MONEY LOST. It is no defense to an action to recover money lost at gambling that the same was not the property of the plaintiffs.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. The refusal of a new trial for newly discovered evidence will not be allowed except for abuse of discretion.

APPEAL—REVIEW—HARMLESS ERROR—GAMING. In an action to recover money lost in gambling, it is harmless error to exclude evidence that the defendants operated a large number of gambling games in the room in question, or that the defendant had pleaded guilty in a criminal prosecution, where the jury found for the plaintiffs and the appeal only involved the amount of the recovery, the appellants claiming that the same was too small.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered October 15, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action to recover money lost at gambling. Affirmed.

R. H. Fry, for plaintiffs.

Vance & Mitchell, for defendant.

Root, J.—This was an action by plaintiffs to recover the sum of \$600, claimed to have been lost by plaintiff James Crowley at gambling in defendants' saloon. The defendant

¹Reported in 95 Pac. 1016.

Rogers made no answer to the complaint, and a default was taken against him. The trial was had against defendant Taylor before the court and a jury, and resulted in a verdict and judgment for plaintiffs in the sum of \$305.62. From this judgment each party has appealed.

We will first consider the appeal of defendant Taylor. His first assignment of error is upon the action of the court in using this language in its instructions to the jury, to wit: "This is an action to recover money lost at gambling." Defendant urges that this was assuming that money had been lost, and constituted a comment upon the testimony by the court. Considering the connection in which the language was used, we do not think it should be given this construction. It was not a comment, and we do not think it could have been so construed by the jury.

Defendant next complains of an instruction wherein the jury were told that the defendant Rogers had failed to answer and that a default had been taken against him. As the complaint showed the action to be against two defendants, it was undoubtedly proper for the court to mention why one of the defendants was no longer in the case. We do not think defendant was prejudiced by this action.

Defendant complains that the jury were told that, in order to find for plaintiff, "they must be satisfied by a preponderance of evidence that persons resorted to and visited the place known as 'The Oxford' (defendants' business place) for the purpose of wagering money at gambling games maintained, conducted, opened and carried on at said place by defendants." Defendant urges that it was immaterial whether the gambling occurred in such a place or elsewhere. If this contention be true, it would seem that the jury was called upon to find more facts than were necessary to exist in order to return a verdict against the defendant. If this was error, it would seem to be the plaintiffs rather than the defendant who would have cause to complain thereof.

It is further contended that the court erred in refusing to

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Opinion Per Root, J.

give an instruction requested by the defendant, to the effect that the jury could not return a verdict in favor of plaintiffs if they found that the money lost by Crowley was not the property of himself or wife. We think this instruction was properly refused. It is urged that the motion for new trial should have been granted, and especially upon the showing of new evidence as to alleged statements of plaintiff James Crowley inconsistent with his testimony. The granting of a motion for new trial upon such grounds is largely in the discretion of the trial court, and we are not convinced that the showing made in this case was such as to render the denial of the motion an abuse of discretion. Several other errors are assigned, but an examination of them fails to reveal any grounds justifying a reversal of the judgment.

We will now notice the cross-appeal of plaintiffs. They urge that the trial court erred in excluding evidence to show that the Oxford saloon was maintained as a public gambling resort in which defendants operated a large number of prohibited gambling games. We think this evidence was admissible, but that its exclusion does not constitute a reversible error, for the reason that the rejected evidence had no bearing upon the amount of the recovery. As to the fact of gambling and loss of money, the jury found for plaintiffs; consequently the latter were not injured by the exclusion of this evidence, which was doubtless material upon those questions, but had no bearing upon the amount of recovery.

Plaintiffs urge that their motion for a directed verdict at the close of the trial should have been granted. We think not. There was a conflict in the evidence and as to what it established, and it was for the jury, taking the evidence as a whole, to say as to what were the facts.

What we have here said also applies to the assignment of error upon the action of the court in denying plaintiffs' motion for a judgment notwithstanding the verdict, and as to their motion for a new trial.

It is further urged that the court was in error in excluding the record of the plea of guilty and sentence of defendant Taylor in a criminal proceeding wherin he pleaded guilty to conducting a gambling resort at The Oxford on September 1, 1904. It is unnecessary to pass upon this question as the error, if it was an error, could not have been to the prejudice of plaintiffs, as the jury found in their favor except as to the amount, and the question as to this could not have been legally affected by the proffered evidence.

Finding no error in the record, the judgment of the superior court is affirmed.

HADLEY, C. J., RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7237. Decided June 1, 1908.]

CURTIS FISK, *Respondent*, v. TACOMA SMELTING COMPANY,
*Appellant.*¹

DISMISSAL AND NONSUIT—VOLUNTARY. Under Bal. Code, § 5085, the plaintiff is entitled to voluntary nonsuit at any time before the jury retires, if there is no set-off or counterclaim interposed.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered September 25, 1907, granting plaintiff's motion for nonsuit, in an action for personal injuries. Affirmed.

Hudson & Holt, for appellant.

Frank S. Carroll, for respondent.

PER CURIAM.—This is an action for damages for alleged personal injuries. At the conclusion of respondent's testimony, appellant challenged the sufficiency of the evidence and moved the court for a judgment. The motion was denied.

¹Reported in 95 Pac. 1082.

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Opinion Per Curiam.

The respondent asked the court to continue the case so that he might be enabled to procure a witness whose testimony he regarded as essential. The court refused to continue the case; whereupon the respondent asked the court for a voluntary nonsuit, which the court granted. From the ruling of the court in granting the nonsuit, this appeal is taken.

Paragraph 1, § 727, chapter 23, Pierce's Code (Bal. Code, § 5085), the chapter in relation to judgment of nonsuit, is as follows:

"An action may be dismissed, or a judgment of nonsuit entered in the following cases: 1. By the plaintiff himself at any time, either in term time or in vacation, before the jury retire to consider their verdict, unless set-off be interposed as a defense, or unless the defendant sets up a counter claim to the specific property or thing which is the subject-matter of the action."

It will be seen at a glance that the terms of the statute are so certain and definite as to preclude construction. The motion in this case was made before the jury retired, and there was no set-off interposed or counterclaim set up. The court acted by express authority of the statute, and the judgment is therefore affirmed.

[No. 7233. Decided June 1, 1908.]

JAMES W. GOODRICH, *Respondent*, v. REBECCA KIMBLE *et al.*,
*Appellants.*¹

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly denied where no diligence was shown.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. The refusal of a new trial, asked on the ground of newly discovered evidence, will not be reviewed where no abuse of discretion appears.

CANCELLATION OF INSTRUMENTS—COMPETENCY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the cancellation of a deed on the ground of incompetency of the grantor, about seventy-three years of age, and because of undue influence, where it appears that the property, valued at \$600, was deeded in consideration of an agreement by the grantee to pay \$50 per year as long as the grantor lived, which was paid for nine years without complaint made by the grantor or any of her children with whom she lived most of the time, and she appears to have been competent to transact business and no advantage was taken of her.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered July 15, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enjoin the defendants from trespassing and committing waste upon real property. Affirmed.

E. W. Howell, for appellants.

Million, Houser & Shrauger, for respondent.

MOUNT, J.—The respondent brought this action to enjoin the appellants from trespassing and committing waste upon certain real estate. The answer of the appellants consisted of certain admissions and denials, and also of a cross-complaint by which it was alleged, that appellant Rebecca Kimble deeded the land in question to respondent in the year 1898; that at the time of making the deed she was by reason of old age

¹Reported in 95 Pac. 1084.

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Opinion Per Mount, J.

incompetent to make the deed; that the consideration therefor was inadequate; that the title to the land was obtained from her by the respondent through fraud, undue influence, and deceit; and prayed for a cancellation of the deed. These allegations were denied by the answer. The cause was tried to the court without a jury, and at the conclusion of the trial the court found in favor of the plaintiff and against the defendants, and entered a judgment accordingly. Thereafter the defendants moved for a new trial upon the ground of newly discovered evidence, which motion was denied.

The first error assigned is that the court erred in denying this motion. There is no showing of diligence by the appellants. The action of the trial court in matters of this kind rests largely within the discretion of the court, and is reviewed only for abuse thereof. Since no abuse of discretion appears, there is no merit in the assignment.

It is next argued that the trial court should have set aside the contract between the respondent and Rebecca Kimble, because of the incapacity of the latter, and also because the respondent permitted the land to become encumbered with tax liens. It appears that Rebecca Kimble obtained title to the land in question, amounting to twenty-five acres, in the year 1897. It was then worth about \$600. She was then about seventy-three years of age. She agreed to and did, on January 13, 1898, deed the land to the respondent for a consideration of \$50 per year, to be paid to her on the first day of January of each year as long as she should live. After the deed was made and after the first payment, she selected the acre of ground, and respondent erected at his own expense a small dwelling thereon satisfactory to her. She occupied the house for two or three years, and then went to the state of Ohio where some of her children were living. She remained there until 1907, when she returned to this state, and immediately sought to rescind the contract for the reason that \$50 per year was not sufficient to support her. At the time she entered into the contract with respondent, he was married to

her granddaughter. The respondent has regularly, since the year 1898, paid the \$50 per year, and has improved the property. There is some evidence to the effect that Mrs. Kimble had odd notions and was not competent to transact business. But the great weight of the evidence convinces us that she was competent to enter into the contract at the time it was made, and that no advantage was taken of her. She had several grown children who helped to support her both here and in Ohio. They knew of the contract after it was made. She enjoyed the benefits of the contract for nine years, and no complaint was made by her or any of the children that the contract was inequitable. They evidently supposed the contract was a fair one, until recently when the land became more valuable. It is true, there were delinquent taxes against the land at the time the action was begun, but these were paid off by the respondent before the time of the trial. An examination of the whole record convinces us that the judgment of the trial court was right.

It is therefore affirmed.

HADLEY, C. J., DUNBAR, ROOT, FULLERTON, RUDKIN, and CROW, JJ., concur.

[No. 7210. Decided June 1, 1908.]

M. C. SOULE, *Appellant*, v. TOWN OF OCOSTA, *Respondent*.¹

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SPECIAL WARRANTS—LIABILITY. A town is not liable out of its general fund upon warrants drawn against a special fund, issued to a contractor to pay for a local improvement, where the complaint does not state that the town has collected or diverted the money, but simply alleges that it has done nothing toward collection for the reason that the property was not specially benefited; since the warrant holder can compel the town to provide the fund, or if the property is not specially benefited, the contractor and holder are charged with notice thereof.

¹Reported in 95 Pac. 1083.

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Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 2, 1907, upon sustaining a demurrer to the complaint, dismissing an action upon warrants. Affirmed.

John C. Stallcup, for appellant.

J. B. Bridges, for respondent.

MOUNT, J.—This action was brought to recover upon eighteen warrants, drawn upon a special fund for street improvements. The defendant demurred to the complaint. The demurrer was sustained, the plaintiff refused to plead further, and the action was dismissed. Plaintiff appeals.

The complaint alleged, in substance, that the defendant is a municipal corporation, duly organized and existing under the laws of the state of Washington; that in 1891 and 1892 said corporation graded, planked, and sidewalked Ocean avenue; that the work was performed and concluded in the year 1892; that the said improvement was not of special benefit to the abutting property, but was of general public benefit to the municipal corporation and its people; that warrants issued against the special fund were paid to the contractor, G. L. Lake, for the cost and price of said improvement; that the plaintiff in good faith and for value purchased eighteen of the said warrants; that the face value of these warrants was \$1,485.63. Paragraph 26 of the complaint alleges as follows:

"That by reason of the fact that said improvement was of no special benefit to the property abutting on said Ocean avenue, nothing was ever paid into the fund nor anything paid by the abutting property owners, nor was anything ever done by the said defendant corporation towards collecting the cost of said improvement by means of proceedings against the property owners abutting on said Ocean avenue nor otherwise, so that no money was ever obtained in that way for the payment of the cost of said improvements. That the plaintiff purchased said warrants in good faith for value, without

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knowledge of said facts, and never discovered or had knowledge of said facts until within the last three years."

The complaint then sets out the amount of damages claimed, and a copy of each of the warrants. These warrants, with the exception of the amounts and the dates, read as follows:

"Ocosta, Wash., Dec. 10, 1891.

"To the Treasurer of the Town of Ocosta: Pay to Geo. L. Lake or order Two Hundred and Fifty Dollars out of Ocean Avenue East End fund for street improvements.

"\$250.00.

"Attest: A. M. Mitchell, City Clerk.

"F. G. Deckebach, Mayor."

It is argued by the appellant that, because the improvement was of benefit to the town and of no special benefit to the abutting property, there was no basis for a special fund and none was ever provided, and the town never asserted any claim against the abutting property, and therefore the town is liable out of its general fund. In *German-American Savings Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259, this court held that, where the cost of a street improvement is to be paid out of a special fund raised by the city from assessments upon the property benefited, there can be no recovery against the city for failure to cause such fund to be raised, as long as the assessment can be enforced in any way. In *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524, it was held that a city cannot be rendered liable generally upon warrants drawn against a special fund for the payment of street improvements, even if the remedy of a street assessment proceeding is no longer available. This last-named case was subsequently followed in *Rhode Island Mortgage & Trust Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104. To the same effect is *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197. In *State ex rel. Security Savings Society v. Moss*, 44 Wash. 91, 86 Pac. 1129, where general fund warrants were issued to take up street improvement warrants after the special fund had become exhausted, it was held that such general fund

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Syllabus.

warrants were without consideration and void because the special assessment was not an obligation against the city. To the same effect see *State ex rel. American etc. Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321, and *State ex rel. Barnes v. Blaine*, 44 Wash. 218, 87 Pac. 124.

It is not alleged that the town of Ocosta has collected or diverted the money. The allegation is that the town has done nothing toward collection, and that the improvement was of no special benefit to the abutting property. The appellant had a remedy to compel the town officers to act, and if the improvement was of no special benefit to abutting property, the contractor was charged with notice of that fact at the time he took his contract and did the work. The appellant stands in no better position. It is clear under the authorities above cited that there is no general liability against the town. The trial court therefore properly sustained the demurrer.

The judgment must be affirmed.

HADLEY, C. J., CROW, DUNBAR, FULLERTON, RUDKIN,
and Root, JJ., concur.

[No. 7335. Decided June 1, 1908.]

A. W. LUEDERS, *Appellant*, v. TOWN OF TENINO,
Respondent.¹

TRIAL—CONDUCT—REOPENING—DISCRETION. It is discretionary to reopen a case for further evidence upon a showing that it was unknown to counsel, where the opposite party is given an opportunity to rebut the same.

DEDICATION—PARKS—ORAL DEDICATION—EVIDENCE—SUFFICIENCY. There is sufficient evidence of an oral dedication of a park where the owners platted adjoining lands into lots and blocks, giving out blue prints showing the park, and selling lots on representations that the same abutted on the park, and permitted general use of the same as a public park for many years.

¹Reported in 95 Pac. 1089.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered December 27, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Frank C. Owings, for appellant.

Troy & Sturdevant, for respondent.

MOUNT, J.—The plaintiff brought this action to quiet his alleged title to certain lands in the town of Tenino. The town claims title by reason of a dedication to the public for park purposes, and by adverse possession. At the trial a decree was entered in favor of the town. The plaintiff appeals.

Two errors are assigned; (1) that the court erred in reopening the case for further evidence upon motion of the defendant after the case was submitted; (2) that the evidence is not sufficient to show a dedication of the property to the public for park purposes by the grantors of the appellant. On the first question it appears that, after the cause was submitted to the trial court for decision, before a decision had been made, the respondent applied to the court, upon notice to the appellant, to reopen the case for further evidence. Affidavits were filed. Upon a hearing the court granted the application and received further evidence. It is conceded by the appellant that the reopening of the case rests in the discretion of the trial court, but it is argued that the court abused its discretion because the evidence which was subsequently introduced might have been obtained before the submission of the case. The showing upon the motion to reopen the case was that this evidence was unknown to the counsel at the time of the trial and was subsequently discovered. This was sufficient to justify the order of the court, especially where no unfair advantage was taken of the appellant and where he was given an opportunity to rebut this

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Opinion Per MOUNT, J.

evidence, as is the fact here. There appears to have been no abuse of discretion in this case.

Upon the second question there appears to be abundant evidence to show an oral dedication of the property in dispute to the town as a public park. The evidence clearly shows that, along about the years 1890-91-92, the land in question was owned by William Raglass and wife. They platted certain adjoining lands into lots, blocks, and streets. They had certain blue prints made of this land, and upon these blue prints showed the land in question as a park. They gave out these blue prints, and sold many lots upon the representation that this park was a public park, and many persons purchased lots and block adjoining the park, relying upon such representation. The citizens of the town, with the acquiescence of Raglass and wife, used the premises, which were recognized generally as a public park for many years. The appellant, a few months prior to the time of bringing this action, purchased the property with notice and knowledge of these facts. There is some question whether there was a dedication of this land by deed; but assuming that the dedication by deed refers to another piece of ground, the facts shown prove a clear intention to dedicate this particular tract, and that Raglass and wife and the appellants are now estopped to say the land is not a public park. 13 Cyc. 454 *et seq.*

The judgment is therefore affirmed.

HADLEY, C. J., CROW, DUNBAR, FULLERTON, and RUDKIN, JJ., concur.

[No. 7343. Decided June 1, 1908.]

F. L. GRIFFIN, *Appellant*, v. THE CITY OF TACOMA *et al.*,
*Respondents.*¹

MUNICIPAL CORPORATIONS—WATER SUPPLY—ACQUISITION—ORDINANCE—SUBMISSION TO VOTE—VALIDITY. An ordinance for an election to authorize the purchase by a city of the plant of a water company need not specifically mention a source of supply held in reserve by the company, where the vote authorized the purchase of all sources of supply owned in connection with the system.

SAME. An extension of a city's water system to springs which it purchased with an existing system, and which it held for years as a reserve supply, is not a change in the plan of the city's water system which need be authorized by a vote of the people within the contemplation of Bal. Code, § 835.

MUNICIPAL CORPORATIONS — FISCAL MANAGEMENT — DIVERTING FUNDS. A city charter providing for special funds, and that all moneys collected by taxation for a special purpose shall remain in the special fund therefor, and that no fund shall be diverted from the purpose for which it was originally collected without a vote of the people, has reference only to a permanent diversion of funds, and does not prevent the temporary transfer as a loan of part of the general fund to a special fund having a permanent income under the control of the city.

SAME—INDEBTEDNESS—CONSTITUTIONAL LIMIT. The transfer of general funds to a special fund for the purpose of constructing an extension to a water system is not the incurring of a municipal indebtedness, within the constitutional inhibition, where the special fund is solvent and the general fund is not imperilled (RUDKIN and FULLERTON, JJ., dissenting).

SAME—PLEDGING WATER RECEIPTS—SUBMISSION TO VOTE. The pledging of receipts from a water system for the purpose of paying for the cost of an extension does not create a municipal indebtedness; and the same need not be authorized by a vote of the people, where the funds are used to further a general plan pursuant to a vote once taken.

SAME—POWER OF CITY—STATUTES—CONSTRUCTION. Laws 1901, p. 177, providing the details for the payment or securing of indebtedness for water works by the issuance of bonds or the pledging of water receipts, does not apply where no general indebtedness was created and the ordinance dealt only with increasing a water system by the expenditure of moneys received from the system itself.

¹Reported in 95 Pac. 1107.

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Opinion Per HADLEY, C. J.

SAME—CONTRACTS—FAILURE OF OFFICER TO SIGN—EFFECT. A charter provision requiring a contract to be signed by the comptroller is directory only, and a contract is not void for want of the comptroller's signature when his duty to sign was merely clerical.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 18, 1908, dismissing an action for an injunction, after a trial before the court without a jury. Affirmed.

Leo & Cass, for appellant.

C. M. Riddell, J. W. Quick, C. E. Dunkleberger, T. L. Stiles, F. R. Baker, and *Frank Latcham*, for respondent city.

Titlow & Huffer, for respondent Savage.

HADLEY, C. J.—This action was brought by the plaintiff, as a resident citizen and taxpayer of the city of Tacoma, to enjoin that city and its codefendant Savage from proceeding with the construction of a main pipe line and other adjuncts to connect certain springs, known as "Maplewood Springs," with the water system of Tacoma as now operated. In the month of March, 1908, the city council of Tacoma duly passed an ordinance numbered 3264, authorizing such construction, and provided that the commissioner of public works in calling for bids should state that the contractor for any part of the work should agree to accept payment in cash by warrants drawn upon and payable out of the Maplewood extension fund, as created and established by ordinance. The same ordinance also created such special fund by setting aside from the gross revenues all proceeds derived from the water works system now belonging to, or which may hereafter belong to, the city at least fifty per cent thereof, exclusive of revenue for water used by the city for municipal purposes, and provided that all moneys so set aside and placed in such special fund shall be applied solely to payment for the aforesaid construction, and to other expenses necessarily incidental

to such construction. On the same day the city also passed Ordinance No. 3265, by the terms of which there is transferred from the general fund of the city to the said special fund the sum of \$100,000. The transfer was made in the nature of a temporary loan from the general fund to the special fund, to be returned to the general fund under the provisions of Ordinance 3264, and also of Ordinance 3201. The latter ordinance expressly provides that when any money is by ordinance transferred from one fund of the city to another, the sum so transferred shall be by the proper officers transferred back to the original fund whenever there is sufficient amount in the fund to which the transfer was made to return the amount so transferred. The commissioner of public works advertised for bids, and the city let two contracts to the defendant Savage, under the terms of the ordinance as aforesaid. One contract was for the building of the main pipe line between Maplewood Springs and the city of Tacoma, in length from eight and one-half to nine miles, for the price of \$119,387; and the other was for the construction of a force main in the city for such extension, for the price of \$48,643. The contractor entered upon the prosecution of the work, and thereupon this suit was brought to enjoin its further continuance, as well as all further proceedings to accomplish the construction under said ordinances and contracts. The cause was tried by the court, and resulted in a judgment denying any injunctive relief and dismissing the action. The plaintiff has appealed.

Appellant's first contention is that the Maplewood Springs extension is an addition to the present water system of the city, and that Ordinance 3264 does not provide for submitting to the electors of the city for their ratification or rejection the question of making said addition. It must be determined whether the extension is in fact an addition to the present water system which calls for ratification by the electors. Under the terms of Ordinance No. 790 the electors of the city did hold an election in 1893 to determine, among other things,

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whether the city should purchase of the Tacoma Light and Water Company its water works and all sources of water supply then owned or operated by said company as part of its water system. The vote was in favor of such purchase, and the same was effected, the regularity of the proceedings being upheld by this court in *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077. The company then owned the Maplewood Springs in connection with its water system, and they belonged to and were a part of the various sources of water supply which the company had provided for its system, although it had not previously actually drawn water from these particular springs. They were held as a reserve source of supply for future use. The springs were transferred by the company to the city as a part of its water system, and the city has ever since been the owner. Through the proceedings here attacked by appellant, the city is now seeking to utilize this source of supply which it acquired and has for years owned and held as part of its source of supply to its water system.

Appellant makes the point that, inasmuch as the Maplewood Springs were not specifically mentioned in Ordinance 790, the electors therefore did not authorize their purchase by the vote of 1893. We think it was not material that they should have been specially mentioned. The electors by their vote authorized the purchase of all sources of water supply either owned or operated by the company in connection with its water system. This covered the springs in question, and when the city acquired them they became a part of its authorized water system which it may now utilize. We do not think there has been any change of plan as contemplated by the statute of 1895, Pierce's Code, § 3784 (Bal. Code, § 835). This statute has been called to our attention in a brief filed by the new city attorney of Tacoma, who assumed his official duties after this cause was submitted here. The attitude of the present city administration toward this controversy seems to differ from that of the administration which was in charge when the cause was first submitted here. The city cannot now,

however, be heard to repudiate its former position if that position is sustainable in law, but we receive the suggestion of the present city attorney as presenting points which should be considered in the determination of the controversy. We believe that the above statute cited by him is inapplicable here, for the reason that this case does not present one of a change of plan, but the city is simply adhering to its original plan of utilizing the different sources of water supply which it purchased from the Tacoma Light and Water Company by authority of a vote of the people then taken, and no vote is now required to authorize the details of furthering that plan.

The appellant's next contention is that the transfer of money from one fund of the city to another as provided by Ordinance 3265 is prohibited by the city charter. The charter provision referred to is § 96, p. 66, Revised Chapter and Ordinances of the City of Tacoma, and is as follows:

"Immediately after the *annual tax* levy the City Treasurer shall open and keep separate and distinct accounts with each *special* fund made necessary by *law*, and whenever any taxes shall be collected and paid into the treasury he shall credit each fund with its proportionate amount of such tax, and the same shall remain so credited and shall be paid out only in payments of *orders* drawn against said fund. *All funds raised by a vote of the people or by special taxation, or any other manner for a special purpose, shall be used for that purpose, and none other.* No fund shall be diverted from the purpose for which it was originally assessed or collected or voted by the people without the proposition therefor is submitted to a vote of the people and authorized by at least a majority vote at either a special or general election. The Treasurer shall keep such accounts and make such other reports and perform such other duties incident to his office as may be prescribed by ordinance."

It will be seen that the charter provision first deals with the subject of special funds provided by law, and requires that moneys which have been collected by taxation for such special funds shall remain therein. It is not provided that moneys which have been collected for the general fund for general

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municipal purposes may never, in the interest of expediting the city's business, be temporarily transferred to a special fund; but it is provided that no fund shall ever be diverted from the purpose for which it was originally collected. The word "diverted" is used in the sense of turning permanently from its purpose, the equivalent of appropriation for some other use. A temporary transfer from the general fund to another fund with an assured income is not an appropriation or diversion. With its outstanding credit against the other fund, the assets of the general fund remain the same, and its power to accomplish general municipal purposes has not been decreased. The city controls both funds, and it is under the legal obligation to see that the general fund is seasonably reimbursed from the source of supply to the special one. Of course the city authorities must exercise common business sense in making such transfer. As a personal loan of magnitude is not ordinarily made to an individual who is insolvent, so a city should not transfer its general fund moneys as temporary loans to other funds that have not assured and certain sources of income, the collection of which is under the control of the city itself. The evidence shows the special fund in this case to be such. The income from the water system is about \$20,000 a month, and the amount is increasing. The city collects and disposes of this money and has provided for placing one-half of the water income in the special fund. The city owns the water system with a large amount of money invested therein. The people are dependent upon the city for their water supply which they must have for the conveniences and necessities of life. The city fixes the water rates and enforces collection with practically the same regularity and universality that it levies and collects general taxes. The source of supply to the special fund is therefore to all intents and purposes as constant and certain as that of the general fund. The purpose of the transfer made by the city is doubtless to provide immediate funds for carrying on the construc-

tion so that there may be no delay while awaiting the incoming of water taxes. The transfer under such circumstances does not imperil the general fund, and if the city in the accomplishment of the purpose to supply sufficient water to its people finds that such transfer will accelerate such needed result, there is nothing in the charter provision that prevents it.

It is next suggested that the proposed pledging of the water receipts and the transfer from the general to the special fund, will obligate the city for new indebtedness which it cannot incur by reason of the constitutional limitation upon that subject. This court has already held that the mere pledge of the water receipts as a special fund does not create a debt against the municipality within the meaning of the constitutional inhibition. *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888, *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895. We have also seen from what has already been said that the transfer from one fund to the other creates no indebtedness against the city. It is a mere temporary loan to a fund, with an assured income, whose sources of supply are entirely under the control of the city. The city's general funds are not thereby in fact reduced, inasmuch as the credit of the general fund for the temporary transfer is the equivalent of cash as a working asset, and no new debt of the city arises.

It is suggested in the brief of the present city attorney that the pledging of the water receipts should be authorized by a vote of the people. No statute is pointed out which so expressly provides, and inasmuch as their pledging does not create a municipal indebtedness it would seem that such vote is unnecessary where the funds are being used to further a general plan of utilizing water sources which have been acquired in pursuance of a vote once taken.

The brief of the present city attorney also suggests that Ordinance 3264 fails to provide for certain details required by the statute of 1901 (Laws 1901, p. 177), as found in

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subdivision (b), Pierce's Code, § 3644. From an examination of the entire section we think it appears that the details enumerated in subdivisions (a) and (b) relate to procedure when actual indebtedness is created against the city. The two subdivisions are immediately preceded by the following language:

"When the system or plan has been adopted and the creation of an indebtedness by the issuance of bonds or warrants assented to as aforesaid, the said corporation shall be authorized and empowered to construct and acquire the improvements or lands contemplated, and to create an indebtedness and to issue bonds or warrants therefor, or for the condemnation thereof, as hereinafter provided, to wit:"

Subdivision (a) relates to details for the issuance of bonds evidencing a general indebtedness, and subdivision (b) authorizes the city authorities, at their option, to create a special fund from the water receipts, which fund appears to be intended as in the nature of additional security for the general indebtedness. That subdivision (b) deals with a method of securing general indebtedness we think appears not only from the general context of the whole section, but also from the specific provision in subdivision (b) that "The city or town authorities may from time to time, by ordinance, transfer to any such special fund any other available funds of said city." There can be no other "available funds" that can be so transferred, where the special fund is composed entirely of water receipts, which alone are pledged, and in such a manner as to create no indebtedness against the city. That ordinance does not therefore deal with the conditions contemplated by the statute cited, but it is confined to the subject of increasing the utility of the water system by the mere expenditure of a part of the moneys received from the operation of the water plant itself. In the absence of express legislation upon the subject, the method of such expenditure in its details may be regulated by the city authorities.

We think the suggestion by appellant that the contract is void because not countersigned by the city comptroller is

without merit. It is true there is a city charter provision to the effect that contracts entered into by the city shall be countersigned by the comptroller, but the provision is directory merely, and the failure to so countersign does not render the contract void. Unless the law clearly makes the countersigning necessary to the validity of the contract, the duty to countersign is merely ministerial, and the failure of a ministerial officer to discharge that duty does not affect the validity of the contract. The contract was authoritatively executed in behalf of the city by the commissioner of public works, and the comptroller's duty in the premises was clerical, without discretion on his part, and he could doubtless have been compelled to perform it. *State v. District Court of Ramsey County*, 32 Minn. 181, 19 N. W. 732; *Goodyear Rubber Co. v. Eureka*, 135 Cal. 613, 67 Pac. 1045.

We find no substantial ground for reversing the judgment of the lower court, and it is therefore affirmed.

MOUNT, CROW, DUNBAR, and Root, JJ., concur.

RUDKIN, J. (dissenting)—I concur in the majority opinion, except in so far as it upholds the right of the city to transfer or loan money from the general fund to the special water fund. I am also inclined to agree with the majority that the charter provision applies only to a permanent diversion of funds. But it does not follow from this that the city has power to shift its funds or loan its credit in the manner proposed. On the contrary its powers are limited and defined by the law of its creation, and when its authority is challenged it must be able to point to the source of its power. The burden does not rest on the challenging party to point out the restraint or prohibition. If the city may transfer or loan \$100,000, it may transfer or loan the full amount necessary to construct a water or light plant, and when its credit is thus loaned its liabilities are increased to the extent of the loan. The adequacy or inadequacy of any security it may have or hold is entirely beside the question. The security

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may be good in this case, but it may be bad in the next, and the existence of the power cannot depend on the wisdom or folly that may accompany its exercise. I therefore dissent.

FULLERTON, J., concurs with RUDKIN, J.

[No. 7062. Decided June 2, 1908.]

FEEDA STRANDELL, *Respondent*, v. THOMAS MORAN *et al.*,
*Appellants.*¹

BONDS—ON PUBLIC WORKS—ACTIONS—NOTICE OF CLAIM—OVERSTATEMENT—EFFECT. The overstatement of the amount due, in a notice to a city of a claim for material furnished to a contractor upon public work, is not fatal to recovery upon the contractor's statutory bond to secure laborers and materialmen, where actual fraud is not shown.

SAME—SIGNING OF NOTICE—SUFFICIENCY. Such a notice, required by the statute to be signed by the claimant, is sufficient when signed by one "A. S. Agent," through whom the claimant did business, without disclosing the principal, where no one was misled thereby; since the same fulfills the purpose of the statute to give notice of claims.

APPEAL—REVIEW—VERDICTS. A verdict of a jury upon conflicting evidence cannot be disturbed on appeal because against the weight of the evidence.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered April 25, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a contractor's surety bond. Affirmed.

Fairchild & Bruce, for appellants.

Bugge & Swartz, for respondent.

FULLERTON, J.—In December, 1903, the appellant Moran entered into a contract with the city of Whatcom (now Bellingham) by the terms of which he agreed, for a stated consideration, to grade and otherwise improve Maple street,

¹Reported in 95 Pac. 1106.

in that city, according to certain specifications attached to the contract. At the time of entering into the contract Moran gave a bond on which his coappellants were sureties, in the sum of \$6,500, running to the state of Washington, conditioned that he would pay for all material that it should be necessary to use in the successful performance of the work. While Moran was performing the contract, the respondent sold and delivered to him to be used therein 120,768 feet of lumber, at the agreed price of \$8.50 per thousand feet, board measure. Of this quantity Moran used on the work some 90,916 feet, the remainder, or some part of it at least, being rejected by the city engineer as unsuitable for the purposes for which it was intended. Moran did not pay for the lumber purchased, and the respondent, within 20 days after the completion of the contract, gave the city the following notice:

"Bellingham, Wash., Sept. 23, '04.

"To the Honorable Mayor & Members of the City Council
of the City of Bellingham, Wash.

"Gentlemen:—Please take notice that the undersigned, Andrew Strandell, who furnished material for and upon the contract between the City of Whatcom, Washington and Thomas Moran for the grading, sidewalking and improving of Maple St., between High street and Newell Street, has a claim for the sum of \$1,026.52 against the bond taken from Thomas Moran, wherein he is the principal and Miller G. Scouten & Otto Matthes are sureties.

"Andrew Strandell. By D. T. Winne, her attorney."

The city officers, notwithstanding this notice, paid the balance due on account of the contract over to Moran, leaving the claim unsatisfied. The present action is an action upon the bond to recover the contract price of the lumber furnished the contractor for use in improving the street. The trial court limited the amount of the recovery to the lumber actually used in the construction work, and the jury returned a verdict for the amount so used, at the contract price, with interest. Judgment was afterwards entered upon the verdict, and this appeal is taken therefrom.

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The first assignment of error goes to the sufficiency of the notice above quoted. The notice is thought to be fatal to the respondent's right of recovery, first, because it claims as due a much larger sum than was actually due the respondent; and second, that it was not signed by the respondent. As to the first objection, it is not necessarily fatal to the respondent's right of recovery that the notice stated a larger sum to be due than was afterwards actually recovered. With regard to statutory liens, courts have often held them invalid where an exaggerated statement of the amount due was made in the notice, or where the amount claimed was unduly enlarged by the intermixture of lienable and nonlienable items, but even in these cases there must have been a wilful misstatement of the amount due or an exaggeration so gross as to imply wilful misstatement before that result would follow. Mistakes made in good faith, although increasing the claim beyond the amount justly due, are not fatal to a maintenance of the claim for the amount actually due. *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721. The same rule should apply to notices under the statute in consideration here. If the notice is made in good faith, under the honest belief that the amount demanded is justly due, the claimant should not be denied the right to recover for the amount actually due merely because his notice does overstate his just claim. Actual fraud, or acts from which fraud is necessarily implied, should be shown before that result should be held to follow. The trial court therefore did not err in refusing to rule as a matter of law that the mere fact that the amount due was overstated in the notice filed with the city council barred the right to recover the amount justly due.

The statute provides that the notice required to be given the board with whom the bond is filed "shall be signed by the person or corporation making the claim or giving the notice," and it is urged in support of the second branch of the objection that the notice at bar is neither signed by the present

claimant nor by any one on her behalf, but is signed by a stranger to the record. The respondent was doing business through an agent under the name of "A. Strandell, Agent," Andrew Strandell being the full name of the person who so acted. The notice was signed, it will be observed, by Andrew Strandell without the addition of the word "Agent," and this omission is thought to render the notice void, since, as it is claimed, such a signing is neither a signing by the real nor the trade name of the claimant. But the primary purpose of the statute is notice. It is intended to inform the city and the bondsmen of the contractor who, if any, of the laborers, mechanics, and materialmen have not been paid, and any form of notice that does this, and does not mislead either the city or the bondsmen to their injury, is sufficient to comply with the statute. In the case before us there is no pretense that either the city or the bondsmen were misled, or that it was want of such notice that prevented the retention of the amount of this claim from the balance due the contractor paid him or on his orders after the notice was received. The record does show that the city officers were misled by a transaction of some kind had between the contractor and a third party, but it was not one for which the respondent was responsible.

It is next contended that the contract between Moran and the city was assigned by Moran to one Clark without the knowledge or consent of the sureties, and that such assignment relieved the sureties from their obligation. But whether this result would follow were the fact established we do not need to determine. The question whether it was so assigned was a disputed question at the trial on which contradictory evidence was introduced. The question therefore was one for the jury. It was moreover submitted to them by the court and determined in favor of the respondent. This concludes the question in this court.

The last contention is that the respondent was tendered payment in full by Moran and the city council of all that was

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justly due her, long prior to the commencement of this action, and that this tender was refused. These facts, it is claimed, exonerated the sureties. But here, also, the facts were in dispute. Whether or not there was such a tender was a disputed question which the court submitted to the jury, who determined it contrary to the contention of the appellants. True, the appellants say there was no substantial testimony contradicting their contention, but we find against it the positive testimony of the respondent's agent. Whether his testimony was true or false was for the jury and trial judge to determine. This court has no authority to weigh the evidence.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, Root, Crow, Mount, and DUNBAR, JJ., concur.

[No. 7291. Decided June 2, 1908.]

**THE CITY OF OLYMPIA, Respondent, v. MRS. J. D. KNOX,
Appellant.¹**

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS—LIMITATIONS—ESTOPPEL—LACHES. Under a statute authorizing a reassessment after the original assessment has been found invalid, which fixes no limitation as to the time within which the reassessment shall be made, a city is estopped to make a reassessment eleven years after the original assessment was declared void upon objection made by the city in actions brought against the city; since the delay was unreasonable.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered February 17, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a local assessment lien. Reversed.

¹Reported in 95 Pac. 1090.

Troy & Falknor, Vance & Mitchell, and G. C. Israel, for appellant.

George R. Bigelow and William W. Manier, for respondent.

Root, J.—This action was brought to foreclose a lien on certain lots of appellant, in the city of Olympia, for a special assessment levied on account of the grading of Third street. From a judgment and decree in favor of the city, this appeal is prosecuted.

The grading was done in 1891, and a special assessment to pay therefor was confirmed by the city council January 26, 1892. In 1904 a reassessment was made upon these lots, and to enforce such reassessment the present action was instituted on the 19th of June, 1907. Appellant pleads the statute of limitations, and urges that the reassessment was not made in due time. Respondent contends that there is no statute or other law limiting the time within which a reassessment may be made and that, in view of the circumstances surrounding this case, the reassessment herein was levied within due time and is enforceable. We will notice certain proceedings which were thought to have a bearing upon the questions before us. The grading was done and the original assessment made under Ordinance No. 495. Shortly thereafter, certain proceedings were instituted in the superior court to foreclose special street assessments believed to be identical or similar to that made upon these lots. One of these suits was that of Olympia v. Owings, which resulted in favor of the defendant by a judgment entered January 27, 1893. In 1895, Thomas & Company, a corporation, brought an action against the city to compel it to collect the amount of the original assessment. In this action the city defended upon the ground that the original assessment was invalid, and prevailed. In 1897 Phillips, as receiver of the First National Bank, instituted an action to compel the city to proceed to reassess. In this case the city sought to assert the validity of the original assessment, but this court held that it was estopped from asserting

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the validity of such assessment by reason of having, in the Owings case, and on other occasions, urged that said assessment was invalid. *Phillips v. Olympia*, 21 Wash. 153, 57 Pac. 347. This decision was rendered in 1899. In March, 1893, the legislature enacted a statute authorizing a reassessment of property for special benefits where it should be found that a former assessment was invalid. The reassessment statute contains no limitation as to the time within which a reassessment is to be made, and the respondent urges that no limitation as to time is in any manner placed upon the city in making such reassessment, and relies particularly upon the cases of *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045, and *Port Townsend v. Trumbull*, 40 Wash. 386, 82 Pac. 715.

Notwithstanding the excellent brief and able argument of the attorneys for respondent, we are unable to agree with the conclusion reached by the honorable superior court. The statute of 1893 permitted a reassessment to pay for this grading which had been done about two years prior to that time. It is suggested by respondent that the city authorities were in error in supposing the original assessment to have been void, and that the decision of the courts upon which the city authorities apparently relied were upon assessments essentially different from the original assessment herein, and did not constitute authority for holding that this original assessment was invalid. As an original proposition, there would perhaps be some force in this contention; but the city, in defending one or more actions brought against it in the courts, solemnly asserted the invalidity of such original assessment and prevailed upon such contention, and this court in the *Phillips* case held the city estopped to turn about and assert the validity of that assessment. If the city was at that time estopped to make such contention, it would seem to be clearly so estopped now. Having prevailed in the *Owings* case upon that defense, the judgment in which case was entered January 27, 1893, it would seem that there was no reason why the city

should not have been at liberty to proceed with the reassessment immediately upon the passage of the reassessment law in March, 1893. However, it did not make any reassessment until 1904, eleven years after it was authorized to reassess, and thirteen years after the work had been done.

To fix a definite time within which a reassessment should be levied in order to be deemed to have been made within a reasonable time, is not without difficulty. Various facts and conditions must be taken into consideration, and it is well-nigh impossible to lay down any definite rule; and we think that the courts should hesitate to question the action of the city council in determining how soon they should make a reassessment. But this cannot be carried to the extent of ignoring the rights of others. In this case, taking into consideration all the conditions and circumstances shown by this record, we do not find justification for the long delay indulged in by the city before making this reassessment. We do not think, under the circumstances here shown, that this reassessment was made within a reasonable time. We think, on the other hand, that it was unreasonable to defer the same for eleven years. This being true, the reassessment was invalid and cannot be enforced.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., DUNBAR, FULLERTON, RUDKIN, CROW, and MOUNT, JJ., concur.

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[No. 7186. Decided June 3, 1908.]

FRANK A. MANNING, Appellant, v. HENRY FOSTER *et al.*, Respondents.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—SALE BY HUSBAND—ASSENT OF WIFE—ESCROWS—EVIDENCE—SUFFICIENCY. In an action to compel the specific performance of an escrow agreement to deliver a deed for community lands, the fact that the wife called and signed the deed while in escrow is sufficient evidence that she knew of and assented to the terms of the sale.

FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM—ESCROWS—EVIDENCE OF CONDITION. The conditions upon which a deed is delivered in escrow need not be evidenced by a written memorandum in order to satisfy the statute of frauds relative to the sale of lands; but may be shown partly by writing and partly by parol.

ESCROWS—LEGALITY—CONDITIONS RESTING IN PAROL—EVIDENCE—SUFFICIENCY—SPECIFIC PERFORMANCE. There is a legal escrow agreement that may be specifically enforced, where the deed was deposited in escrow in a bank to be subsequently executed by the wife, which was done, and at the same time money, notes and warrants were likewise deposited by the grantee, the warrants to be endorsed by one who was temporarily absent, who endorsed the same within a reasonable time, although the papers were only accompanied by an unsigned memorandum, as of a "special deposit," reciting that the deed was to be delivered on payment of the deposited consideration, the other conditions of the escrow resting on parol.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 26, 1907, upon sustaining a motion for nonsuit, dismissing an action for specific performance. Reversed.

Troy & Falknor, for appellant.

Reynolds & Stewart, for respondents.

Root, J.—This was an action to enforce specific performance of an alleged escrow agreement. On the 18th of December, 1905, the defendant Henry Foster executed a deed for the land in question, at a consideration of \$4,500, and by

¹Reported in 96 Pac. 233.

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agreement with plaintiff placed said deed in escrow with certain bankers in Chehalis. With the deed there was deposited cash in the sum of \$2,854.63, a promissory note for \$500, and certain warrants amounting to \$1,145.87, a total of \$4,500. It was understood that the wife of defendant was to come and sign and acknowledge the deed, and that the warrants were to be indorsed by one J. R. Welty. When Mrs. Foster should sign the deed and the warrants should be indorsed by Mr. Welty, the deed was to be delivered to the appellant and the money, note, and warrants were to be turned over to respondents. The deposit of these instruments and money was accompanied with a memorandum as follows:

Deposited with Coffman, Dobson & Co., Bankers, Chehalis, Washington.

Special Deposit.

By Henry Foster, December 18, 1905.

Patent & Warranty Deed for delivery (when signed) to Frank

A. Manning on payment of

| | |
|----------------------------|-----------|
| Cash | \$2854.63 |
| Note | 500.00 |
| 3 R & B Warrants | |
| No. 2611, 2610 & 2609..... | 1145.87 |
| Total | 4500.00 |

J. W. A.

Some days after the deposit, Mrs. Foster called and signed and acknowledged the deed. Mr. Welty, being a state official with office at Olympia, was seldom in Chehalis, but was expected to be there some time during the Christmas holiday season. He came on Christmas, but the bank not being open, was unable to sign the warrants at that time, and returned to Olympia without doing so. A few days afterward, without the consent of the appellant, the respondent Henry Foster withdrew the deed from said bankers. Shortly thereafter said Welty indorsed said warrants, and the appellant demanded of respondents the delivery of the deed. They refused to deliver the deed; whereupon this action was commenced. Upon the trial the facts as hereinbefore set forth

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were established by the evidence of appellant. Thereupon a motion for nonsuit was made by respondents, and the same sustained by the trial court. From a judgment of dismissal, this appeal is prosecuted.

We are unable to reach the conclusion announced by the honorable trial court. It is urged that this was community property, and that there was no evidence that Mrs. Foster had any knowledge or information of the agreement between the plaintiff and Henry Foster, her husband. The fact that she came to the bank and signed and acknowledged the deed, after it had been left there pursuant to the agreement between her husband and appellant, would seem to be satisfactory evidence that she understood and was assisting to carry out the agreement.

It is urged that there was no valid or written contract by the defendants, or either of them, to convey the lands, and that there was no sufficient memorandum to satisfy the statute of frauds. In the case of *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162, this court said: "The condition upon which a deed is delivered in escrow may rest in and be proved by parol." In *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380, this court held that an escrow agreement need not be in writing. At page 586, 16 Cyc., it is said: "Parol evidence is permissible to prove the condition upon which the instrument is deposited."

In the case of *Gaston v. Portland*, 16 Ore. 255, 19 Pac. 127, the court said:

"Nor is it necessary that the condition upon which the deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral. The rule that a contract in writing *inter partes* must be deemed to contain the entire agreement or understanding has no application in such case."

In 11 Am. & Eng. Ency. Law (2d ed.), at page 334, it is said: "It may be stated as a general rule that no particular form of words is necessary to constitute an escrow."

In *Cannon v. Handley*, 72 Cal. 133, 18 Pac. 315 the court spoke as follows:

"But it is said there was nothing in writing authorizing Cox to hold or deliver the deed. There is nothing in the statute which requires this to be in writing. The statute only requires a note or memorandum in writing as evidence of the contract. Nothing in it has reference to any arrangement for the delivery of the deed in escrow, or its subsequent delivery by the parties so holding it to the grantee."

In *Stanton v. Miller*, 58 N. Y. 192, the court used this language:

"The condition upon which a deed is delivered *in escrow* may be expressed in writing or rest in parol, or be partly in writing and part oral. The rule that an instrument or contract made in writing *inter partes*, must be deemed to contain the entire agreement or understanding, has no application."

Of course this does not mean that a written escrow agreement can be varied by parol. *Pacific Nat. Bank of Tacoma v. San Francisco Bridge Co.*, 23 Wash. 425, 63 Pac. 207. See, also, *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Glenn v. Hill*, 11 Wash. 541, 40 Pac. 141; *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565; *Monfort v. McDonough*, 20 Wash. 710, 54 Pac. 1121; *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338, 114 Am. St. 137; *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361; 16 Cyc. 570, 576-7; Daniel, Negotiable Instruments, § 68; *Thordalson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; Browne, Statute of Frauds (5th ed.), 366.

In the case at bar the deed of conveyance having been duly executed by the defendants and deposited at the same time plaintiff deposited his money, note, and warrants, all accompanied by the written memorandum above set forth, and said

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Syllabus.

warrants having been properly indorsed within a reasonable time, we think there was a legal escrow agreement and a compliance by appellant with his part thereof, and that defendants should be held to their agreement, unless then can show other reasons than now appear in the record for not so doing. We think oral testimony was permissible under the circumstances of this case to show what the agreement of the parties was as to delivery of the deed, and that the evidence introduced establishes an escrow agreement binding upon the parties.

The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

HADLEY, C. J., DUNBAR, MOUNT, CROW, and RUDKIN, JJ., concur.

[No. 7104. Decided June 3, 1908.]

J. J. BLEITZ, *Respondent*, v. MATTHEW O. CARTON,
*Appellant.*¹

LIBEL AND SLANDER—WORDS ACTIONABLE PER SE—IMPUTING CRIME. It is actionable slander *per se* to say of a man that he "has another wife back east," as the words in effect charge bigamy.

SAME. It is not actionable *per se* to utter orally that a man is not fit to associate with other people and has been in jail two or three years back east.

SAME—PLEADING—VARIANCE. In an action for slander in uttering of a man that he has "another wife and child back east," in effect charging him with the crime of bigamy, it is a fatal variance to prove that "he has a wife and child back east and is living with another woman here," which would only constitute the crime of adultery; since the old rule that in slander a variance is fatal has not been relaxed to such an extent as to allow allegation as to one crime and proof of another (FULLERTON, RUDKIN, and DUNBAR, JJ., dissenting).

SAME—FAILURE OF PROOF. In an action for slander in charging a man with being a bigamist, proof that he did not actually call him a bigamist but said he had a wife back east and was living with another woman here, is not only a total failure of proof, but amounts to a positive denial of the allegation.

¹Reported in 95 Pac. 1099.

SAME—VARIANCE—BILL OF PARTICULARS. Where, in an action for slander, a bill of particulars was furnished showing when and before whom the words were spoken, the plaintiff is not entitled to show that the words were spoken at other times and places; and such proof, introduced for the purpose of showing malice, will not support a verdict where the complaint was not amended (FULLERTON, RUDKIN, and DUNBAR, JJ., dissenting).

SAME—PLEADING—ANSWER—ADMISSIONS—JUSTIFICATION. Where the complaint in an action for slander alleged the uttering of a positive charge of bigamy, a justification in the answer admitting that the words were uttered conditionally, i. e., "If what Mr. D. has told me is true," is not inconsistent with a general denial, and does not admit the allegation of the complaint.

SAME—VARIANCE. Proof of a conditional statement of slanderous words does not support an allegation of a positive or direct statement (FULLERTON, RUDKIN, and DUNBAR, JJ., dissenting).

SAME—JUSTIFICATION—PRIVILEGED COMMUNICATIONS—EVIDENCE. A conditional statement charging a man with bigamy "if what Mr. D. tells me is true," made by a member of a fraternal order, of and respecting an applicant for membership, and made to a member of the order while the applicant's reputation was under investigation for the purpose of showing his unfitness, is a privileged communication for which damages cannot be recovered, where D. had told the defendant that plaintiff (who had a wife and children here) "had another wife and children in Illinois" and had communicated to the defendant circumstances known to D. back east from which it appears that the plaintiff was not a bigamist, but had secured a divorce from his first wife, that he had been charged with perjury in so doing, had settled the matter by giving notes to her, and had paid only one of the notes (FULLERTON, RUDKIN, and DUNBAR, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Rigg, J., entered July 25, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for slander. Reversed.

John F. Miller and James McNeny, for appellant.

John E. Humphries and George B. Cole, for respondent, to the point that there was no material variance between the pleading and proof, cited: *Herhold v. White*, 114 Ill. App. 186; *Harris v. Zanone*, 98 Cal. 59, 28 Pac. 845; *Brueshaber*

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v. *Hertling*, 78 Wis. 498, 47 N. W. 725; *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *Cassem v. Galvin*, 53 Ill. App. 419; *Goodrich v. Warner*, 21 Conn. 431; 13 Ency. Plead. & Prac., pp. 63, 64, 67. Proof was unnecessary when defendant admitted the charge, for every repetition of a slander is actionable and defendant admitted the charge. Newell, Defamation Slander and Libel, p. 350, § 4; 18 Am. & Eng. Ency. Law (2d ed.), p. 1016. Before a defendant can plead a justification, he must admit the speaking of the words charged. *Shipp v. Patton*, 29 Ky. Law 480, 93 S. W. 1033; 4 Ency. Plead. & Prac., p. 669; Stephen, Pleading, p. 206; *Rooney v. Tierney*, 82 Ky. 253.

CROW, J.—Action by J. J. Bleitz against Matthew O. Carton, for slander. From a verdict and judgment in favor of the plaintiff, the defendant has appealed.

The appellant contends that the trial court erred in denying his motion for a nonsuit and a directed verdict. A demurrer having been sustained to the first cause of action, trial was had on the second and third causes only. In his second cause of action the respondent alleged that, on April 5, 1906, the appellant did speak of and concerning him to one Dr. Frank T. Maxson, the words: "Bleitz is not a fit man to associate with decent people. He has another wife back east, and a wife and child here. He has been in jail two or three years back east. I have the documents to prove all this;" and that appellant meant to thereby charge that the respondent had been guilty of the crime of bigamy. The trial judge correctly held that the alleged words: "He (Bleitz) has another wife back east, and a wife and child here," were actionable *per se*, as they, in substance charged the crime of bigamy (25 Cyc. 264); but that the other words alleged to have been orally uttered were not actionable *per se*. 25 Cyc. 265.

Dr. Maxson was the only witness called to show the speaking of the words alleged in the second cause of action. His testimony was that the appellant said to him of and concerning

respondent: "He has a wife and child back east, and is living with another woman here." The appellant contends that this evidence shows a fatal variance between the words alleged to have been uttered and those proven; that the testimony of the witness Maxson did not establish, but disproved the allegations of the complaint; that to charge that a man who has a wife is living with another woman is not equivalent to charging him with having another wife; that the effect of the words proven was to charge that the woman with whom respondent was living was not his wife; that although the words shown to have been spoken might, when accompanied by proper colloquiam and proof of surrounding circumstances, tend to establish an accusation of adultery; they do not establish or tend to establish the crime of bigamy; and that the allegation of the complaint is an accusation of one act, while the proof made is an accusation of an entirely different act, as proof of adultery does not sustain a charge of bigamy.

In actions for libel and slander the general rule as to variance is that, if the allegations of the pleading and the proof do not strictly correspond, the plaintiff cannot recover. This rule, which was rigidly enforced in the earlier cases, has been somewhat relaxed by later adjudications, so that proof is now held to be sufficient if the charge of the complaint is substantially sustained, although the proof made does not in every minute particular correspond with the words alleged. 25 Cyc. 484. After a careful examination of numerous authorities, we have been unable to find any cases in which the general rule has been so far relaxed as to hold that an allegation of the speaking of words charging one crime or misdemeanor is sustained by proof of the speaking of words charging, or tending to charge, a different crime or misdemeanor, or that such a failure to prove the words alleged would not constitute a fatal variance. Respondent alleged the speaking of words which, in substance and effect, charged the crime of bigamy, such words being actionable *per se* although spoken. The words proven can, by no possible con-

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struction, be held to have charged respondent with bigamy. The variance was therefore fatal. One reason for requiring substantial proof of the words alleged is that the defendant may, if he so desires, have an opportunity to plead and prove justification by showing the truth of the words charged. Were it to be conceded that the appellant had actually said of and concerning the respondent in this action that he had a wife and child back east, and another wife and child here, thereby charging him with bigamy, it could not be seriously contended that he would establish the truth of such words under a plea of justification by showing that respondent, while having a wife back east, was living with another woman here. By the words alleged he would have charged bigamy, but such a showing as to the facts would not constitute a justification. The absence of any plea of justification in this action does not have the effect of decreasing the amount or accuracy of proof to be required of the respondent in sustaining the allegations of his complaint.

In *Doherty v. Brown*, 10 Gray 250, the supreme judicial court of Massachusetts said:

"The proof of making a charge of unchastity against the plaintiff does not sustain the allegation in the first count that the defendant charged the plaintiff with being a common prostitute. They are not the same charge. Supposing the words as set out to have been proved, it is plain that proof of the unchastity of the plaintiff would not be a justification of the charge made."

In *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251, the court said:

"We do not think an allegation of stealing whiskey fines (by a justice of the peace) was met by proof of not paying over a fine for an assault. There may be no difference in the legal or moral quality of the acts, but there is a difference in their identity; and a plaintiff should be informed what charges in justification he is expected to meet."

In *Perry v. Porter*, 124 Mass. 338, it was substantially held that, in an action for slander, an allegation that the de-

fendant had accused the plaintiff of larceny was not sustained by proof of words accusing him of deception and fraud. In *Kimball v. Page*, 96 Me. 487, 52 Atl. 1010, it was held that an allegation of the speaking of the words, "Mima stole the pin," was not sustained by proof of the speaking of the words, "Mima stole the buckle." *Jones v. Edwards*, 57 Miss. 28; *Crotty v. Morrissey*, 40 Ill. 477; *Smith v. Moore*, 74 Vt. 81, 52 Atl. 320.

In respondent's third cause of action it was alleged that, on April 9, 1906, the appellant did speak to one A. E. Croft of and concerning him the words: "Bleitz is a bigamist. I threw it in his teeth and he did not deny it. He has two wives." The only witness called to prove the speaking of these words was A. E. Croft, who testified that: "He (Carton) said that he (Bleitz) had a wife and family in the East, and that he was living here with another woman. He didn't state, he didn't call him a bigamist in so many words, that is he didn't call Mr. Bleitz a bigamist that I can recollect." This evidence was not only such a failure of proof as to constitute a variance, but it in effect amounted to a positive denial of the allegations of the third cause of action of the complaint.

The respondent contends that the verdict and judgment should be sustained, for the reason that proof was made of the speaking of the alleged words at other times, in other places, and to other persons than the times, places, and persons alleged, and that such proof was sufficient. He did not amend, nor did he ask to so amend, his complaint as to permit such proof. Prior to the trial the appellant demanded, and respondent furnished, a bill of particulars, stating the names of all persons known to the respondent, who were present at the times of the speaking of the words alleged in the complaint. Yet the respondent now contends that he is entitled to show a speaking of the alleged words at other times and places, and to other persons. If this method of proof of a cause of action could be permitted, a bill of particulars would be of no value

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or advantage whatever to the party to whom it is furnished. The evidence on which the respondent now attempts to thus predicate his right to recover consisted, in part, of the testimony of certain witnesses who narrated other conversations which occurred after the commencement of this action, and was none of it introduced for the purpose of showing the speaking of the alleged words at the times and places or to the persons pleaded in the complaint. It related to the other conversations offered for the sole purpose of showing malice. The principal witness upon whose statements the respondent now relies was one Bennett Young, but his evidence constituted a variance, as he positively testified that the appellant, in referring to respondent, said: "He has a wife and family here *who was not his wife*."

The appellant, in pleading the defense of privileged communication, in substance alleged that, on April 5, 1906, the respondent applied for admission to a secret fraternal order of which appellant was a member; that respondent thereby submitted his moral character, reputation, standing, past and present mode of life, to an investigation by the order and its members; that while his application for admission to the order was pending, and at a regular meeting of one of its lodges, the appellant did, on April 5, 1906, speak of and concerning the respondent to Dr. Frank T. Maxson, who was then and there a member of the order, the following words: "*If what Mr. Davis has told me is true*, Bleitz is not a fit man to belong to the order. *He tells me* he (Bleitz) has a wife and children back in Wyonette, Illinois, and you know he has a wife and children here;" that such words were uttered by appellant without malice, in good faith, and with the sole object, intent, and purpose of assisting the members of the order in an investigation of the character of applicants, and that the speaking of the words was privileged by reason of the time, place, occasion, and circumstances under which they were uttered. Respondent now contends that this affirmative allegation of the answer amounts to an admission of the speaking

of the words pleaded in the complaint, and that by reason of such admission it was not necessary for him to offer further proof. The allegation of the complaint set forth a positive charge of bigamy which appellant denied. Appellant then alleged that he did speak the words set forth in his answer, in the manner and under the circumstances there narrated. Respondent denied that appellant had made use of the qualifying words: "*If what Mr. Davis has told me is true,*" and now insists that the affirmative allegation of appellant's answer, being inconsistent with his denials, is conclusive proof against him. The affirmative allegations of the answer were not inconsistent with its denials, nor do they as pleaded amount to an admission of the speaking of the words alleged in the complaint. The allegation of the complaint was that the appellant made of and concerning respondent a positive and direct statement that he had a wife and family back east, and that he had another wife here, thereby substantially charging him with the crime of bigamy. In pleading the defense of privileged communication, the appellant alleged that he said conditionally that *if what Mr. Davis had told him was true*, Bleitz was not a fit man to belong to the order, etc. Proof of slanderous words spoken in a conditional or hypothetical statement does not support an allegation of slanderous words pleaded as a positive or direct assertion. *Townshend, Slander and Libel* (4th ed.), § 364; *Evarts v. Smith*, 19 Mich. 54; *Stees v. Kemble*, 27 Pa. St. 112; *Nailor v. Ponder*, 1 Marv. (Del.) 408, 41 Atl. 88.

The undisputed evidence discloses that respondent did formerly have a wife and three minor children in Illinois; that he sold his business on April 4, 1902, and left them in that state on April 5, 1902, going to Sedgwick county, Kansas, where he lived for about one year; that he then went to Pawnee county, Kansas, where on May 12, 1903, he commenced an action for divorce, making service by publication; that he filed an amended petition on July 11, 1903, and on July 16, 1903, obtained a decree, his wife having failed to appear;

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that he returned to Sedgwick county; that a warrant was issued in Pawnee county for his arrest on a charge of perjury based on certain allegations of his petition for divorce; that as shown by certified copies of the proceedings, he was arrested and taken back to Pawnee county; that he there met an attorney who represented his wife and children, who claimed he had abandoned them in Illinois, and who had a requisition for his return to that state; that he made a settlement with the attorney by giving a series of six notes of \$50 each for their support; that the criminal charge of perjury was then dismissed, he paying the costs; that he paid only one of the notes; that on September 10, 1908, he was married to his present wife in Jeffersonville, Indiana; that at the time of the speaking of the words alleged in the complaint, he had made application for membership in a new lodge which was being organized in a fraternal secret order of which appellant was already a member; that substantially the above facts as to his former wife and a newspaper account of his arrest had been communicated to appellant by one Davis, who had known respondent back east, and knew that he had a wife there, not the same person who is his wife here; that respondent has not contributed to the support of his former wife and his children in Illinois, except by the payment of one \$50 note; and that appellant made to Dr. Maxson, who was then a member of the order, the conditional statement which he pleaded in his answer. Under these facts the respondent was not entitled to recover damages, and the motion for a directed verdict should have been sustained.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

FULLERTON, J., (dissenting)—Conceding that there was a variance between the allegations and proofs as to the exact language used by the appellant, yet both were equally actionable, and we see no reason why the complaint should not be

deemed amended to conform to the proofs as in other cases. The court below concluded that no prejudice resulted from this variance, and no such claim is advanced here. But the appellant relies wholly upon a technical rule of procedure and pleading which has long since been discarded in this jurisdiction. I therefore dissent from the judgment, as the plea of justification was not sustained.

RUDKIN and DUNBAR, JJ., concur with FULLERTON, J.

[No. 7142. Decided June 4, 1908.]

ANNA M. COLLINS *et al.*, Respondents, v. T. F. SEYFANG *et al.*, Appellants.¹

CANCELLATION OF INSTRUMENTS—GROUNDS—FRAUD—INCAPACITY—RELIEF GRANTED—ACCOUNTING. A feeble-minded mother and son, the owners of real and personal property, are entitled to the cancellation of leases of the property given by them for the term of twenty-five years in consideration of nominal annual payments, obtained by the lessee by working upon their fears and by agreeing to keep the son out of an insane asylum and to support the mother during life, which support lessee failed to furnish; and, also, to an accounting for rents received from a subtenant, and for personal property obtained by the lessee without consideration.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered April 29, 1907, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to cancel leases and to recover personal property obtained thereunder. Affirmed.

Vance & Mitchell, for appellants.

Troy & Falknor, for respondents.

PER CURIAM.—The plaintiffs in this action are mother and son, respectively. The mother is seventy-eight years of age, and the complaint alleges, that both she and her son are feeble

¹Reported in 95 Pac. 1088.

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in body and mind; that, by reason thereof and also by reason of the fear of both that the son may be incarcerated in a hospital for the insane, others may easily impose upon and influence them. Prior to June 1, 1904, the mother owned a life estate in a certain tract of land containing about eighteen acres, and the son owned the land subject to the life estate. It is alleged that the land is highly improved with buildings of the value of \$4,000, and that it is in a high state of cultivation, having an annual rental value of \$250; that on said date the defendant Seyfang took advantage of the feeble condition in body and mind of the plaintiffs, and persuaded them to sign a written instrument purporting to be a lease for said premises to the said defendant for a period of twenty-five years on payment of an annual rental of \$15, lessors to pay the taxes upon the land and the lessee to keep the premises in repair. The instrument also purported to lease the household and kitchen furniture and every article of personal property situated in the dwelling house on said land, except the wearing apparel of the lessors; also the tools for garden, farm, or shop of every character, including platform scales, wagons, carriages, harness, and farm implements, the personality being of the value of \$500; the lease thereof being for twenty-five years, and the \$15 per annum and repairs aforesaid being the only compensation provided for the use of both the land and personal property. It is alleged that the defendant Seyfang persuaded the plaintiffs that, if they would sign the instrument he would be able to prevent the son from ever again being incarcerated in the hospital for the insane, and that he would also care for the mother during her remaining years; that they, being feeble in body and mind, believed his statements, but that the same were false, and were known to the said defendant to be false, at the time they were made; that he has refused to care for the mother, and has compelled her to leave the property.

The above stated facts relate to the first cause of action. The second cause of action states that in a similar manner

Seyfang obtained from plaintiffs possession of another tract of one hundred acres of land, for a term of eleven years, for a rental of \$50 per year for the first three years, and \$150 per year after that, the lessors to pay the taxes. A third cause of action asked an accounting for fifteen head of stock which Seyfang obtained without consideration. The complaint asks for the return of the personal property and that the purported leases shall be set aside as null and void. After a trial by the court without a jury, judgment was rendered cancelling both purported leases and awarding the plaintiffs judgment for \$275 as the value of the stock taken and disposed of by Seyfang. Possession of the other personal property, and also of the real estate, was restored. Seyfang sublet the leased premises to the defendant Price, along with other land, for the full sum of \$600 per year. It was found that about two-thirds of the \$600 was for the use of plaintiffs' lands; and upon such a showing, Price was required to pay that portion of the accumulated rent into the registry of the court under a bond given to protect Seyfang pending the adjudication as to the leases here involved. It was provided in the final judgment of the court that the money so paid into the registry shall be paid to the plaintiffs. The defendant Seyfang has appealed.

The motions to dismiss the appeal and to strike the statement of facts and appellants' brief present some questions that may be serious as to the right to be heard on this appeal, but in view of the fact that we think the case should be affirmed on the merits, we will pass the motions without discussion. Appellant contends that the complaint does not state a cause of action, but we think it clearly does so. The statement of facts is voluminous, and we do not believe a discussion of the evidence is necessary here. The evidence shows facts substantially as alleged in the complaint and as above stated. No findings of facts were entered by the trial court, but we think the judgment is in all respects fully justified by

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the evidence. The disposition that was made of the money in the registry of the court was, in its final effect, an equitable application by a court of equity of funds in its possession, which application was fully justifiable under the facts of the case.

We do not think the court erred, and the judgment is affirmed.

[No. 7213. Decided June 4, 1908.]

G. J. SAUERS et al., Appellants, v. PAUL SMITS, Respondent.¹

PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. Upon conflicting evidence in an action for malpractice in treating a foot by exposure to X-rays, the question of the negligence of the defendant is for the jury, where there was evidence warranting a finding that the foot was severely burned by the X-rays, and the treatment improper, and that the injury was caused by negligence in placing the tubes too near and without any shield.

SAME—LIABILITY—DEFENSES—IGNORANCE OF PHYSICIAN. Ignorance as to the effect of X-ray exposures would be no defense to an action for malpractice in negligently causing an X-ray burn, but rather might make the use thereof negligence *per se*.

SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE OF PATIENT. In an action for malpractice in negligently causing an X-ray burn of a foot, it is error to instruct the jury that the plaintiff could not recover if she quit the treatment before she should have done so, or if she failed to follow the physician's directions with reasonable care; since such acts adding to the damages did not co-operate in causing the injury or bar a recovery for the injury done.

SAME. In such a case, it is error to instruct that any injury resulting from the negligence of the patient would bar a recovery.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 23, 1907, upon the verdict of a jury, rendered in favor of the defendant, after a trial on the merits, in an action for malpractice. Reversed.

W. H. Abel & A. M. Abel, for appellants.

J. B. Bridges, for respondent.

¹Reported in 95 Pac. 1097.

RUDKIN, J.—This action was instituted to recover damages for malpractice. Without going into the details of the complaint, the substance of the plaintiffs cause of action is that, during the early part of the year 1906, the plaintiff Mrs. Sauers was suffering from an ailment of the foot and applied to the defendant, who is a regularly licensed physician and surgeon, for treatment. The treatment prescribed and administered consisted in the daily exposure of the affected member or part to the light and rays of an X-ray machine, for a period of about a month, each exposure lasting from fifteen to thirty minutes. After this course of treatment had continued for some two weeks, the foot began to swell, itch and burn. The treatment continued for about two weeks longer, at the expiration of which time the entire left side of the foot from the toe to the heel was severely burned, so that the skin came off and a large angry sore involving the whole side of the foot was formed; and by reason of the treatment prescribed the foot is permanently injured, the patient has been rendered a cripple for life, and the injury will probably necessitate the amputation of the foot. The negligence charged is that the defendant failed to shield or protect the foot from the X-rays; that he should have discontinued the X-ray treatment as soon as the burning and scalding of the foot made its appearance, and that the tube or bulb of the X-ray machine was placed too close to the foot. Issue was joined on the complaint, and from a judgment and verdict in favor of the defendant, the plaintiffs have appealed.

Two questions have been presented for the consideration of this court: First, the sufficiency of the evidence to warrant the submission of the case to the jury; and second, the accuracy of one of the instructions given by the court. The testimony on the part of the appellants tended to show that there were seventeen daily exposures of the foot to the X-ray machine, except on one date toward the last when the patient was unable to attend the hospital; that no shield was used to

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protect the foot from the X-rays; that the tube or bulb of the X-ray machine was placed not to exceed two or three inches from the foot; that the exposures, after the first, lasted from twenty-five to thirty minutes; that, at the expiration of about two weeks from the first exposure, the foot became very red and itched and burned, and that this condition grew gradually worse from day to day until the patient was no longer able to go to the hospital; that thereafter the respondent attended the patient once at the home of her brother-in-law where she was staying, but did not call on the following day, and another physician was called in; and that after the fifth exposure to the X-rays a medicated paste was spread over the affected part, which was about the size of a nickel. There was further testimony tending to show that, at the close of the respondent's treatment, there was an X-ray burn of the fourth degree on the foot, which is generally considered incurable.

It is unnecessary to refer to the testimony bearing upon the condition of the patient after this time, as it would only go to the measure of damages, and that question is not before us. The testimony on the part of the respondent on the other hand tended to show that the number of exposures was about ten; that the tube or bulb was placed from four to six inches from the foot; that the exposures occurred only every other day, and lasted from eight to eighteen minutes; that the red or burnt appearance of the foot was caused by the paste, and not by the X-rays; that the patient had used her foot contrary to instructions, and by reason thereof the paste spread from the affected part to other parts of the foot; that there was no X-ray burn of any kind; that the treatment was proper, and that at the time of the trial the foot was entirely cured, and in a healthy condition.

There was further testimony on the part of the respondent tending to show that the X-ray is comparatively a new discovery, and was not well understood by physicians and sur-

geons practicing in such communities as Aberdeen at the time this treatment was given. The appellants denied that the patient had disobeyed instructions, or that the paste had spread from the affected part to other portions of the foot, or that the condition of the foot was caused by the paste. It will thus be seen that there was a direct conflict in the testimony on many essential points. The jury would have been authorized in finding that the injured foot was severely burned by the X-rays, that the treatment was improper, and that the injury was caused by one or more of the acts of negligence charged in the complaint. If it should appear that physicians and surgeons in such communities as Aberdeen were as ignorant of the effect of X-ray exposures as some of the testimony tends to show, the jury might well conclude that the use of such a dangerous agency by one who had little or no knowledge as to the probable consequences was negligence *per se*. We are satisfied, therefore, that the motion for a nonsuit and the motion for a directed judgment were properly denied.

The instruction complained of by the appellants is as follows:

"If you find from the evidence that the patient quit the treatment of the defendant before she should have done so, and before he was willing she should quit him, and that any evil results have come from that action on her part, then she would not be entitled to recover. If you believe that the defendant gave her directions as to how she should act and as to how she should treat her foot, how she should use it and take care of it during the time she was treating it, and she did not follow those directions with reasonable care and diligence upon her part, and any injury has resulted on account of that negligence or want of attention or care upon her part, then she would not be entitled to recover."

This instruction was erroneous. If we assume that the patient quit the treatment of the respondent before she should have done so, and before he was willing that she should quit

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him, or that she neglected to follow instructions as to how she should use and care for the foot, and injury resulted by reason thereof, the fact remains that these acts of negligence on the part of the patient in no manner concurred with the act of the respondent in burning the foot, if he did so. It would be a harsh doctrine to say that a patient cannot recover for malpractice if any subsequent or independent act of negligence on her part increases or augments the injury caused by the negligence or incompetency of the attending physician, and such is not the law.

As said by Agnew, C. J., in *Gould v. McKenna*, 86 Pa. St. 297, 27 Am. Rep. 705:

"The contributory negligence which prevents recovery for an injury is that which cooperates in causing the injury—some act or omission concurring with the act or omission of the other party to produce the injury (not the loss merely), and without which the injury would not have happened. A negligence which has no operation in causing the injury, but which merely adds to the damages resulting, is no bar to the action, though it will detract from the damages as a whole."

In *Beadle v. Pain*, 46 Ore. 424, 80 Pac. 903, the court said:

"But it will not suffice to defeat the action that the injured party was subsequently negligent and thereby conducted to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability."

See, also, *Carpenter v. Blake*, 75 N. Y. 12; *DuBois v. Decker*, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. 529, 14 L. R. A. 429; *Wilmot v. Howard*, 89 Vt. 447; Thompson, Negligence, § 201; 22 Am. & Eng. Ency. Law (2d ed.), 407.

The statement that *any injury* resulting from the negligent acts of the patient would bar a recovery was, also, too favorable to the respondent. We are therefore of opinion that there was sufficient evidence of negligence on the part

of the respondent to go to the jury, and that the instruction complained of was erroneous. For this error the judgment is reversed and a new trial ordered.

HADLEY, C. J., FULLERTON, ROOT, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7359. Decided June 4, 1908.]

**TACOMA GAS AND ELECTRIC LIGHT COMPANY, Appellant, v.
LUTHER HARRY PAULEY *et al.*, Respondents.¹**

TAXATION—DELINQUENCY CERTIFICATE—FORECLOSURE—SUMMONS—NAME OF OWNER—KNOWLEDGE OF OWNERSHIP. A tax foreclosure being a proceeding *in rem*, a published summons in a general county foreclosure need not be addressed to the several owners of the property taxed as they appear on the tax rolls, but it is sufficient if addressed to "Unknown" owners, where it appears that the property had changed hands several times, and had been variously assessed to different owners, and there was no showing of fraud or that the treasurer knew, when the delinquency certificate was issued, who the owner was.

SAME—SETTING ASIDE SALE—GROUNDS—OWNERS—KNOWLEDGE OF TAX. The fact that the owner of property wrote to the county treasurer asking for a statement of the delinquent taxes, and received no answer, is not ground for setting aside a tax title based upon a general county tax foreclosure in which the owner was not personally served or named in the summons published.

SAME—GROUNDS—ASSESSMENT ROLLS—DESCRIPTION OF PROPERTY—DECREE—EFFECT. Insufficiency in the description of property in one of the assessment rolls is not ground for setting aside a general county tax foreclosure, in view of Bal. Code, § 1767, making the judgment of foreclosure conclusive evidence of its regularity or validity as to defenses that might have been made, except where the tax was paid or the real estate not liable.

APPEAL—REVIEW—HARMLESS ERROR. Unnecessary findings of fact and conclusions of law in an equitable proceeding do not constitute prejudicial error.

SAME. In an action to set aside a tax title, which was dismissed for failure of the plaintiff to sustain his cause of action, the plaintiff is not injured by a decree confirming the tax title of the defendant.

¹Reported in 95 Pac. 1103.

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Opinion Per Root, J.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 9, 1908, upon findings in favor of the defendants, dismissing an action to set aside a tax sale and deed, after a trial before the court without a jury. Affirmed.

T. L. Stiles, for appellant.

I. B. Knickerbocker, for respondents.

Root, J.—This is an action to avoid a tax sale and deed of certain lands in King county, the sale having been made at the general county sale of 1902. From a judgment dismissing plaintiff's action and confirming defendants' title, this appeal is prosecuted.

The facts are substantially these: On the 17th day of May, 1881, the Northern Pacific Railroad Company contracted to sell the lands in question to one Charlie Tumas, an Indian, upon payments the last of which was to be made in May, 1884. Tumas contracted to pay all taxes on the premises. A conveyance was made to Tumas, October 1, 1884. December 26, 1887, Tumas and his wife conveyed to C. F. Seal. December 23, 1889, Seal conveyed to Horatio C. Clement. February 28, 1890, Horatio C. Clement and his wife conveyed to the Tacoma Light and Water Company. May 1, 1895, the Tacoma Light and Water Company conveyed to the plaintiff. The tract of land in controversy is described as "Lot 8 and the east half of the northwest quarter of the southwest quarter of Sec. 17, T. 21 N., R. 5 East, excepting a tract of 5 acres, described as follows: Commencing at a point 1048 feet east of the northwest corner of the southwest quarter of said section 17; running thence south 20 rods; thence east 40 rods; thence north 20 rods and thence west 40 rods to the place of beginning." The plat drawn on a large scale, which is a part of paragraph 3 of the complaint, shows the situation of the land on Green river. For the year 1883 the entire tract, without the exception, was

assessed to John Lagolt and Chas. Tumas as owners, and a tax of \$3.92 was levied thereon, which not being paid, the property was sold to the county by the sheriff May 7, 1884. For 1884, the taxes seem to have been paid. For 1885, lot 8 was not assessed at all; but the other part of the tract (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$) was included in a description "W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Sec. 17, etc.," assessed to "Charles Tenas," as owner, and a tax of \$11.40 was levied upon the 80 acres described; or, proportionally, \$2.85 on the twenty-acre tract owned by Tumas. This tax not being paid, the land was sold to the county by the sheriff on the 11th day of June, 1886. The taxes were paid for the years 1886-7-8. For 1889, the tax for the west twenty acres (E. $\frac{1}{2}$, N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$) was paid, but that on lot 8 was not paid. C. F. Seal was then the owner of the original two tracts, less the five acres, shown upon the plat referred to, subject to whatever rights had been lost by the two sales above mentioned. As an assessment to Seal, this was the entry in the roll: "Pt. lot 8 (less 5 acres)", the section, township and range following, and by that description it was sold to the county, by the sheriff, on the 9th day of August, 1890, for the tax of \$9.15.

Subsequent to 1890, all taxes were seasonably paid. The Revenue Law of 1893 required the county treasurer to make up a register of unpaid taxes (p. 358, § 80), and provided that lands theretofore sold to counties for delinquent taxes should be deemed registered (p. 360, § 85). And so the treasurer of King county registered each of the above-mentioned sales, and named Charles Tumas and John Lagolt as owners in 1883, "Charles Tenas" as owner in 1885, and C. F. Seal as owner in 1889. The descriptions were the same as above given, excepting that in registering the sale of 1889 the treasurer added to the description: "Pt. lot 8 (less 5 acres)", the following: "Com. at a point 1048 feet E. of N. W. Cor. of N. W. $\frac{1}{4}$ of said Sec. 17; S. 20 rods, E. 40 rods, N. 20 rods, W. 40 rods to beg." Later the above "N. W."

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was changed to "S. W." by some treasurer. Next, pursuant to the statute of 1897 (Secs. 90 and 94, pp. 174 and 181), the treasurer issued two certificates of delinquency, Nos. 94,879 and 94,880, on the 31st of January, 1898. These certificates were not at hand, and resort for their contents was had to the treasurer's record of them, copies of which are contained in the statement of facts. The first certificate, No. 94,879, covered the east one-half of the northwest quarter of the southwest quarter, less the northeast two and one-half acres, by a long and complicated description, and recited taxes, penalties, interest, costs, etc., for two years, 1883 and 1885. The second certificate, No. 94,880, covered lot 8, less five acres, but the excepted tract as described only included about three acres of the lot. There was a recital of taxes, penalties, interest, costs, etc., for two years, 1885 and 1889. Both certificates stated that the owner was "Unknown," although at the time they were issued the original assessment rolls showed the names of the assessed owners, Tumas, Lagolt, "Tenas," and Seal; the register of unpaid taxes contained the same names of owners; and for two years at least —1896-7—the tax rolls of the county had contained the name of the Tacoma Light and Water Company as the owner of the property. In 1890 the lands were sold by the sheriff to the county for taxes delinquent for the year 1889, which taxes appear afterwards to have been paid upon part of the land. On May 14, 1894, the superior court of King county entered a judgment and order of sale, directing the county treasurer to sell said property for delinquent unpaid taxes, and a portion of said property was so sold to the county for the taxes of 1883 and 1885, and the remainder of said property was, under an order of said court, sold to the county for delinquent taxes of 1885 and 1889. All of these proceedings are matters of record in King county.

Some time after the delivery of the certificates of delinquency and prior to January 1, 1902, the county commenced

an action to foreclose said certificates. Said action was a proceeding against all real property upon which there were unpaid taxes for the year 1895, and prior years, and is commonly known as the "King County Omnibus Tax Foreclosure Suit." The notice of summons was published in the Seattle Times, and covered many pages of that paper. All acreage property was described and arranged numerically in said notice and summons according to range, township, and section. The tracts of land involved herein appeared in the proper place in said notice with the owner's name appearing as "Unknown," in each instance. The usual proceedings were had, and a judgment and decree and order of sale duly signed and entered in the suit. Pursuant to said judgment, decree, and order of sale, the county treasurer sold the property herein involved to this respondent, Luther Harry Pauley, and on December 9, 1902, the county treasurer, in pursuance of said sale, executed and delivered to Pauley a tax deed, which was duly recorded. On or about June 15, 1905, the appellant tendered respondent Pauley \$117.08 for moneys paid by Pauley for taxes, penalties, interests, and costs upon said property, and requested respondent to execute to appellant a quitclaim deed of the land in controversy. Respondent declining to receive the money or execute the deed, this action was commenced in July, 1905.

Appellant's first contention is that, because the published summons was not addressed to any of the several owners of the property taxed as they appeared upon the tax rolls up to the day the foreclosure suit was commenced, it was void as to that property, and conferred no jurisdiction upon the court to render any judgment against it. We do not think this contention can be upheld. It has been repeatedly held by this court that proceedings to foreclose a tax certificate are in the nature of proceedings *in rem*, and that they run against the property itself rather than the owner. In the case of *Shipley v. Gaffner*, 48 Wash. 169, 93 Pac. 211, this court said:

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"The main question in the case is, may the county foreclose for delinquent taxes against property assessed to unknown owners, if the taxing officers knew, or by reasonable diligence could have ascertained, the names of the real owners. We have repeatedly held that these foreclosure proceedings are *in rem*, and not against the person of the owner, and that owners are bound to take notice of the property they own and pay the taxes thereon and defend against foreclosure for delinquent taxes, even though the property is assessed to unknown owners or to other persons."

In the case of *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849, this language was used:

"As we have repeatedly held, a tax foreclosure proceeding in this state is a proceeding against property, and is in no sense an action against the person of the owner of such property. Its purpose is to charge such property with its just proportion of the public revenues; and the state's dominion over the land exists for that purpose, without regard to its ownership."

And in the case of *Spokane Falls & Northern R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192, the court spoke as follows:

"Appellant contends that, under the provisions of this section, notice shall be given to the person or persons appearing on the treasurer's rolls as the owner or owners, at the time the notice is given, and not when the certificate is issued. We have frequently held that a proceeding to assess and collect taxes upon real estate under this statute is a proceeding *in rem*."

In *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267, the court said:

"The difficulties attending the collection of public revenue are many at best, and the relation of the citizen to the subject is somewhat different from his relation to the ordinary contractual obligations. He must take notice that by law his property is assessed each year, that the tax is due and delinquent at a fixed time, is a lien upon his land, and, if not paid, that the lien shall be enforced by foreclosure proceedings, and in the manner provided by statute. The action is not *in personam* but *in rem*."

In *Williams v. Pittcock*, 35 Wash. 271, 77 Pac. 385, this language is employed:

"Tax proceedings, under our statutes are purely *in rem*. The same is true of tax foreclosure proceedings. Our statutes permit property to be assessed to an unknown owner, when the owner's name is unknown. It is also provided that the notice in the foreclosure proceedings shall contain the name of the owner, if known. The fair inference to be drawn from these statutes, is that, if a property has been assessed to an unknown owner, and the certificate of delinquency has been so issued, the foreclosure may be had in form against an unknown owner. It would appear that the actual name of the real owner is made no more essential in the proceedings to foreclose, than it is in the assessment. The whole procedure, including the assessment, foreclosure, and sale, is for the purpose of establishing and enforcing a lien for public revenue, which, under the policy of the state, is chargeable to the property only, and not personally to the owner. It is the land itself with which the state is concerned, and its dominion over the land for revenue purposes exists without regard to who may be the owner. All owners know that such is the fact, and that the power of taxation will be exercised each year. In the very nature of our revenue procedure, the statutory provisions with regard to owners must have been intended to be directory, rather than mandatory—of the form, and not of the essence, of the proceedings."

Bal. Code, § 1767 (P. C., § 8704), reads as follows:

"Deeds executed by the county treasurer, as aforesaid, shall be *prima facie* evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns, to the real estate thereby conveyed of the following facts:

"First: That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law;

"Second: That the taxes or assessments were not paid at any time before the issuance of deed;

"Third: That the real estate conveyed had not been redeemed from the sale at the date of the deed;

"Fourth: That the real estate was sold for taxes, assessments, penalties and costs, as stated in the deed;

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"Fifth: That the grantee in the deed was the purchaser, or assignee of the purchaser;

"Sixth: That the sale was conducted in the manner required by law.

"And any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment."

We think, where the certificate of delinquency is regular upon its face and properly and seasonably filed and the foreclosure proceedings thereunder and the sale following are all regular, that there is not an absence of jurisdiction because the county treasurer in making up the certificate of delinquency stated therein that the owner was unknown where the facts are as shown in this case. It appears that this property had changed hands several times and that there were some notations made upon the tax rolls with lead pencil, which the appellant claims were sufficient to indicate to the county treasurer who the owner was. We do not think the showing made here is sufficient to justify the conclusion that the county treasurer knew, or could have known from the tax records, who the owner was at the time he made out the certificate of delinquency. There is no showing of fraud on the part of that official and nothing to show this respondent responsible for any errors which the county treasurer or other county authorities may have made, if any were made, in any of the transactions having to do with the preparation of the certificates of delinquency or their foreclosure. There probably are cases where the owner of property, sold under a cer-

tificate describing the owner as unknown, might be heard to question the foreclosure proceeding. But we do not think the facts in this case justify this appellant in setting aside such foreclosure and sale. An abstract of title or an examination of the published summons would have revealed these unpaid taxes, which had for so many years been delinquent.

An officer of the appellant testified that he wrote to the county treasurer asking if there were any delinquent taxes for former years, but received no answer to his inquiries, and it is urged that this silence justified the appellant in believing that there were no such taxes. We are unable to agree with this conclusion. Had the treasurer answered the inquiries, and stated that there were no delinquent taxes, and such information had been found to be erroneous, a different question might be presented. But we cannot overturn a tax proceeding upon the showing here made in this particular. It is urged that the description in one of the assessment rolls was insufficient. This is insufficient, in the light of Bal. Code, § 1767, to justify a reversal of the judgment. It is urged that the trial court had no authority to make findings of fact and conclusions of law, this being an equitable proceeding. In such an action, findings and conclusions are unnecessary, but the fact that they are made we do not think constitutes an error prejudicial to appellant. Appellant urges that the lower court erred in confirming the title of respondents in and to the real estate involved. If the conclusion of the trial court was correct in finding that appellant's cause of action could not be sustained, and that the foreclosure proceedings and sale were regular, we do not think appellant is injured by the portion of the decree complained of.

Finding no error in the record, the judgment of the superior court is affirmed.

HADLEY, C. J., FULLERTON, DUNBAR, MOUNT, and CROW,
J.J., concur.

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Statement of Case.

[No. 6900. Decided June 5, 1908.]

**CHARLES VEYSEY et al., Plaintiffs, GEORGE L. THOMPSON,
Respondent, v. JOSEPH BERNARD, Appellant.¹**

APPEAL—REVIEW—HARMLESS ERROR—PARTIES—SUBSTITUTION—PLEADING. Upon the death of a party, the substitution of his successor in interest without requiring him to plead over is not prejudicial error, where the motion for substitution was in the nature of a supplemental pleading alleging a transfer of interest, which was adopted by appellant, who was not prevented from controverting the fact and did not suffer thereby.

TRIAL—CONDUCT—PLEADING—ORAL DEMURER—NECESSITY OF WRITTEN PLEADINGS. Where, after trial commenced, leave is granted to file a supplemental answer setting up a counterclaim, it is not error to require the trial to proceed, after the court had announced that a demurrer would be sustained, it being understood that it was so traversed by oral demurrer.

SET-OFF AND COUNTERCLAIM—ATTACHMENT—WRONGFUL ATTACHMENT—PLEADING. A counterclaim for damages arising out of the wrongful issuance of attachment cannot be pleaded in answer to the complaint in the original action.

BANKRUPTCY—DISMISSAL—EFFECT—PROSECUTION IN STATE COURT. In involuntary bankruptcy proceedings, the bankruptcy court has no power, on motion of plaintiff to dismiss, to enter a judgment of dismissal that will preclude further prosecution of the claim against the debtor in the state courts.

ABATEMENT AND REVIVAL—GROUNDS—FEDERAL AND STATE COURTS—UNFOUNDED APPEAL. Where the bankruptcy court, in the dismissal of the petition in bankruptcy, inadvertently recited that the dismissal was without right to further prosecute the claim, an appeal from an order correcting the inadvertence will not abate an action in the state courts against the debtor, as the plea in abatement is easily determinable without reference to the appeal.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 15, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

J. C. Cross (A. Emerson Cross, of counsel), for appellant.

W. I. Agnew, for respondent.

¹Reported in 95 Pac. 1096.

HADLEY, C. J.—This suit was brought in the superior court by Charles Veysey and Marion Veysey, copartners as Veysey Brothers, to recover from the defendant a balance of \$848.10, alleged to be due upon account for goods sold and delivered. The defendant answered, admitting a balance of \$564.45, and offering to confess judgment for that amount. After issue was thus joined, the original plaintiffs in the action, together with other alleged creditors of the defendant, filed a petition in bankruptcy against the defendant in the district court of the United States for the western district of Washington. This defendant appeared in the bankruptcy proceedings and entered his plea to the petition. During the pendency of the bankruptcy proceedings, the petitioners moved the court for the dismissal of their petition, and an order was entered dismissing the same "without right to the said petitioners to further prosecute their respective claims." Afterwards the petitioners moved the court for a modification of the judgment of dismissal so as to expressly show that the right of the petitioning creditors to sue upon their claims in the state courts is preserved, and that the denial of the right to further prosecute is limited merely to the bankruptcy proceedings. The court granted the motion and, over the objection of this defendant, entered an order to that effect, reciting in the order that the original judgment of dismissal was inadvertently entered and did not conform to the motion upon which it was based. Thereupon the said district court granted to this defendant, as the alleged bankrupt in the bankruptcy proceedings, an appeal to the United States circuit court of appeals, and afterwards this defendant filed in the last-named court his petition for the review of the order of modification aforesaid.

The above facts were set up by way of supplemental answer in this case, and for the purpose of abating this suit pending the said review in the United States circuit court of appeals. The supplemental answer also set up as an alleged counter-claim a claim for damages by reason of an attachment which

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it is alleged was wrongfully sued out at the commencement of this action. Pending the suit, the plaintiff Marion Veysey died, and Charles Veysey was appointed administrator of the partnership of Veysey Brothers, and also of the estate of Marion Veysey. In the course of such administration, an order of distribution was made, whereby the chose in action upon which this suit is founded was transferred to Mildred Veysey, a minor, who is the sole heir at law of said deceased. Thereupon George L. Thompson was duly appointed and qualified as the guardian of Mildred Veysey, and as such guardian was substituted as the party plaintiff in this cause. The cause came on for trial before the court without a jury, and resulted in a judgment in favor of the guardian aforesaid for the full amount demanded, with interest. The defendant has appealed.

It is first urged that the court erred in allowing the substitution of respondent without requiring him to plead over, but it is not shown that appellant has suffered thereby. Respondent was merely substituted as the real party in interest, which was proper under our statute. The motion for substitution was in the nature of a supplemental pleading, alleging a transfer of interest, and it does not appear that appellant was prevented from controverting that fact if he desired to do so. Respondent adopted the pleading already in the record with which appellant had joined in issue, and no injury resulted to the latter.

It is complained that the court required that the trial should proceed, over appellant's objection, upon oral pleadings by way of demurrer to the counterclaim contained in the supplemental answer, and also by reply to the same answer. The record, however, shows that the case was regularly assigned for trial prior to the giving of notice of the filing of the supplemental answer, and that the motion for leave to file the supplemental answer came on for hearing at the time of the trial. After the filing was allowed the court stated, in response to an inquiry from respondent's counsel, that a de-

murrer to the counterclaim would be sustained when filed. Under such circumstances there was no error. The convenience of the court required that the trial should then proceed. The original answer had been traversed by reply, and it is clear that both court and counsel understood that the supplemental answer would also be traversed. The issues as thus defined by the record and announced by the court were clearly understood.

It is next contended that it was error to sustain the demurrer to the counterclaim set up in the supplemental answer. The ruling of the trial court was authorized by the decision of this court in *Tacoma Mill Co. v. Perry*, 32 Wash. 650, 73 Pac. 801, where it was held that a counterclaim for damages arising out of the wrongful issuance of an attachment cannot be pleaded in answer to a complaint in the original action, although the attachment may have been dissolved prior to the filing of the counterclaim. The reasons therefor are fully discussed in the opinion cited and need not be repeated here.

Appellant insists that the court erred in not giving effect to his plea in abatement. The recital in the first order of dismissal entered by the bankruptcy court was so manifestly an inadvertence that it would seem no modification was really necessary. It cannot be successfully maintained that, on a mere motion by petitioners to dismiss bankruptcy proceedings, the bankruptcy court has the power to enter a judgment that will prevent the petitioners from prosecuting their valid claims against the debtor in the state courts. The plea in abatement therefore seems easily determinable without reference to the appeal which was taken from the order of modification. The court did not err in refusing to sustain the plea in abatement.

We think the judgment is fully sustained by the testimony, and it is affirmed.

FULLERTON, RUDKIN, DUNBAR, ROOT, MOUNT, and CROW,
JJ., concur.

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Opinion Per HADLEY, C. J.

[No. 7145. Decided June 8, 1908.]

W. M. MAITLAND, Appellant, v. C. M. PURDY, Respondent.¹

PARTNERSHIP—ACTIONS BETWEEN PARTNERS—DISSOLUTION AGREEMENT—EVIDENCE—SUFFICIENCY. In an action between former equal partners, plaintiff claiming that upon dissolution the defendant had overdrawn in a certain sum, and had agreed to pay plaintiff any sum overdrawn, findings that no such promise was made are sustained where the evidence was conflicting, in view of the improbability of such promise.

SAME—RIGHTS AND DUTIES. Upon the dissolution of an equal partnership, an express promise is not necessary for the recovery of one-half of the sum overdrawn by one of the partners.

PLEADINGS—AMENDMENTS—ABUSE OF DISCRETION—PARTNERS—ACCOUNTING. In an action between former partners, upon an alleged promise to pay whatever amount was overdrawn on dissolution of the partnership, it is an abuse of discretion to refuse leave to amend the complaint so as to ask an accounting, where it appears at the trial that no such promise was made as alleged, but that the parties had been equal partners and that defendant had overdrawn a sum that could be determined only upon an accounting; since a party is not to be turned out of court if entitled to any relief.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 2, 1907, upon findings in favor of the defendant, dismissing an action to recover an interest in partnership profits. Reversed.

G. P. Fishburne, for appellant.

Eugene Carr, for respondent.

HADLEY, C. J.—The plaintiff and defendant in this case were formerly copartners, sharing equally in the profits of the partnership business. The complaint avers that, prior to the dissolution of the partnership, the defendant withdrew from the assets of the firm \$429 in excess of the amount drawn by the plaintiff. It is also alleged that, at the time of the dissolution, the defendant agreed with the plaintiff to

¹Reported in 96 Pac. 154.

pay the latter whatever amount the defendant had drawn in excess of the amount drawn by the plaintiff according to the books of the partnership, and that the books showed such excess to be \$429. Subsequent request for payment and refusal to pay are alleged, and judgment is asked for the full sum of \$429. The answer admits the copartnership, but denies all other averments of the complaint. The case was tried by the court without a jury, and resulted in a judgment dismissing the action, from which the plaintiff has appealed.

The opinion of the trial court upon which its decision was based is contained in the record. The court held that the action is based upon the promise to pay the \$429 as the amount drawn by the respondent in excess of what was drawn by appellant. The evidence conflicted as to the promise, and in view of that fact, and of the improbability of the promise being made as alleged, the court found that there was no such promise. We agree with the trial court as to the improbability of a promise to pay the full amount drawn by one partner in excess of that drawn by the other, since under the equal division of profits there was no obligation to pay more than one-half of the excess so drawn. We therefore think that, under the evidence, there was no error in finding as the court did concerning the promise. The partnership was, however, admitted, as well as the equal ownership of the partnership assets and profits, and the evidence undoubtedly showed that the respondent has drawn a sum in excess of that drawn by appellant. The law therefore casts upon respondent the obligation to pay to appellant the necessary amount to make the two equal. This obligation exists without regard to any express promise to pay. It was manifest to the court from the evidence before it that respondent was indebted to appellant in a sum which could be determined by an accounting only, but it was the view of the court that the action was brought as one at law based upon an express promise, and that an accounting cannot be had in this action.

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Respondent asked leave to amend the complaint so as to make any allegations the court thought necessary to cover an accounting, but the application was denied upon the theory that the amendment would change the action from one at law to one in equity for an accounting. If an amendment was necessary, we think it was an abuse of discretion to refuse it and to require the parties to go out of court. If there was surprise by reason of the amendment which called for a continuance or the imposition of terms, that was another consideration to be determined equitably from all the circumstances. No objection was made on the ground of surprise. The objection was based upon the mere denial of the right to amend. Under such circumstances it was an abuse of discretion to refuse the amendment. *Leaman v. Thompson*, 43 Wash. 579, 86 Pac. 926. It was immaterial that the amendment may have introduced issues of an equitable nature. In this state the distinction between forms of actions at law and in equity has been abolished, and if a complaint sets forth any ground for relief, it is the duty of the court to determine the case by applying to the facts the appropriate and necessary principles of law, whether legal or equitable. *Surber v. Kitterenger*, 6 Wash. 240, 33 Pac. 507; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629; *Goupille v. Chaput*, 43 Wash. 702, 86 Pac. 1058.

In the last-named case, it was held that, when it developed in an action to recover money that the amount can only be ascertained through an accounting, the case must be withdrawn from the jury and an accounting had, the pleadings being considered amended to conform to the facts. In essential particulars that case is similar to this one, and the rule there followed should govern here.

The judgment is reversed and the cause remanded with instructions to permit an amendment of the complaint so as to

clearly cover an accounting, and then proceed to hear and determine the case as one for an accounting.

FULLERTON, RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7382. Decided June 8, 1908.]

DANIEL FINCH, *Respondent*, v. IRA M. NOBLE *et al.*,
*Appellants.*¹

VENDOR AND PURCHASER—PURCHASER IN POSSESSION—ACQUIRING TITLE ADVERSE TO VENDOR. Purchasers in possession under a contract for a conveyance, who have failed to pay the taxes as agreed, resulting in a tax sale, cannot acquire the title from the purchaser at a tax sale, as against their vendor, although they had no notice of the tax sale until long thereafter and were not in collusion with the purchaser.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered May 20, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to declare a contract a mortgage and to foreclose the same. Affirmed.

Vance & Mitchell, for appellants.

Geo. H. Funk, for respondent.

RUDKIN, J.—On the 19th day of July, 1898, David Mitchell and wife, as owners of the property now in controversy, entered into a contract whereby they agreed to convey to the defendants, and the defendants on their part agreed to purchase, to pay the purchase price in certain specified installments with interest, and to pay regularly and seasonably all taxes and assessments levied against the property from and after the day of the contract of sale. The defendants entered into immediate possession of the property under

¹Reported in 96 Pac. 3.

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Opinion Per RUDKIN, J.

this contract and have continued in possession ever since. On the 30th day of January, 1899, Mitchell and wife conveyed to the plaintiff subject to the outstanding contract with the defendants. No payments have been made on account of the purchase price, except the interest accruing prior to the 19th day of July, 1904. The defendants failed and neglected to pay the state and county taxes levied against the property for the years 1898 to 1903, inclusive, and, by reason of such failure and neglect, the tax lien was foreclosed at the suit of Thurston county, and on the 30th day of January, 1905, one James K. L. Mitchell purchased the property at tax sale for the sum of \$30.34, and received a tax deed. On the 8th day of August, 1905, the defendants purchased from Mitchell, the purchaser at the tax sale, for the sum of \$150, and received a quitclaim deed. In addition to the foregoing facts, it was found by the court that the plaintiff was informed that the premises had been sold for taxes, after the sale and before the delivery of the tax deed, that the defendants had no knowledge of the tax sale until long after the sale was made, and that there was no collusion between the defendants and the purchaser at the tax sale. The present action was instituted for the purpose of declaring the contract of sale between the Mitchells and the defendants a mortgage and foreclosing the same. On the foregoing facts, over which there is no controversy, the court gave judgment according to the prayer of the complaint, and the defendants have appealed.

The general rule that a tenant or purchaser in possession is estopped to deny the title of his landlord or vendor and will not be permitted to acquire a title adverse to him exists in one form or another in all the states. This general rule is conceded by the appellants, so that we are only concerned with the limitations upon the rule and its application to the facts before us. The appellants frankly concede that they could not themselves become purchasers at the tax sale or acquire a tax title through collusion with others, but they

earnestly insist that, because they did not purchase directly at the tax sale or act in collusion with the purchaser, they may defend under the tax title, notwithstanding the tax sale was made and the tax title exists solely by reason of their own breach of covenant and default. With this last contention we are unable to agree. *Shepardson v. Elmore*, 19 Wis. 446; *Busch v. Huston*, 75 Ill. 343; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Haskell v. Putnam*, 42 Me. 244; Cooley, *Taxation* (3d ed.), 963 *et seq.*

In *Shepardson v. Elmore, supra*, the court said:

"The action being founded upon the covenant, and proceeding upon the obligation of the defendants to pay the taxes, it can make no difference that the defendants took the deed after the expiration of the term. They are as much estopped from denying the plaintiff's title and right of possession as if they had received the deed during the term. The controversy originates in a violation by the defendants of one of the conditions of the lease, and they cannot avoid estoppel by showing that the mischief of which the plaintiff complains was consummated in part after the expiration of the term."

In *Busch v. Huston, supra*, the court said:

"It appears that the lands were sold for the nonpayment of taxes for the year 1844, and conveyed by the sheriff to John E. Johnston, and that he, on the 24th day of May, 1848, quitclaimed the lands to John Shoemaker; but it is not insisted that Shoemaker ever relied upon this deed as, in fact, conveying any title to him. It is evident that he could not do so, for two reasons: 1st. The sale was made in consequence of the nonpayment of taxes which he was under obligations to have paid by the terms of his agreement with John Dewitt, Sr., by which he held and occupied the premises. . . ."

In *Moss v. Shear, supra*, the court said:

"If the defendant was under any legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such negligence, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who

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purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly."

In *Haskell v. Putnam, supra*, the court said:

"It was the duty of the tenant to pay the taxes upon the demanded premises. The omission to do so was a violation of good faith and a breach of the conditions upon which he occupied them. To permit him to set up a title which he has obtained by a violation of his duty if it were in other respects good, would be most manifestly inequitable and in fraud of the rights of the demandant. Such a defense cannot prevail, either in law or in equity, and it requires no small degree of assurance to set it up in a court of justice."

In each of these cases the tax title came through a third person, without collusion, but the court deemed that fact utterly immaterial. The fact that the party in possession and claiming under the tax title was seeking to take advantage of a title which was made possible by his own breach of covenant and default was deemed fatal to his claim.

The appellants concede that the respondent is entitled to a personal judgment for the amount claimed, and there would seem to be little difference between a personal judgment for the purchase price and a judgment declaring the amount a lien, in so far as the purchasers are concerned, for no exemption rights can prevail against either, but we prefer to rest our judgment on the ground on which it was placed in the court below.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, CROW, and DUNBAR,
JJ., concur.

[No. 7246. Decided June 12, 1908.]

**ANDERSON SUELL, Respondent, v. CHARLES H. JONES,
Appellant.¹**

STATUTES— IMPLIED REPEAL — MUNICIPAL CORPORATIONS — ORDINANCES—LAW OF ROAD. An ordinance requiring vehicles going south to keep on the westerly side of the center of a street, and going north, on the easterly side, is not impliedly repealed by an ordinance to regulate the use and speed of automobiles which required that they keep to the right on meeting vehicles, and contained no repealing clause; since there is no express conflict and implied repeals are not favored.

DAMAGES—PERSONAL INJURIES—EVIDENCE—MORTALITY TABLES—AGE—ADMISSIBILITY. In an action for permanent injuries, mortality tables for the years between 54 and 60, to show plaintiff's life expectancy, are admissible, although he is a negro and his age was not shown, except that he was born in slavery and was between fifty and fifty-six years old, the question of his age being for the jury.

SAME—JUDICIAL NOTICE—PLAINTIFF'S ACCEPTABILITY FOR INSURANCE. Standard mortality tables are admissible in evidence to show plaintiff's life expectancy without proving that he was acceptable for insurance, inasmuch as judicial notice may be taken that the authoritative tables differ but slightly, and that many are not based upon insurance statistics.

SAME—INSTRUCTIONS—DETERMINING AMOUNT. In an action for personal injuries, an instruction on the subject of damages does not authorize the jury to go outside the evidence, in that they were told to consider all the evidence in the case and all the facts and circumstances and use their own judgment in arriving at the amount that would in their opinion adequately compensate the plaintiff.

MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—LAW OF ROAD—VIOLATION—INSTRUCTIONS. In an action against the driver of an automobile for coming up behind and running over a street sweeper while driving on the wrong side of the street in violation of a city ordinance, it is proper to refuse to instruct the jury that obstructions on the other side of the street would warrant defendant in passing over to the wrong side, since defendant would be liable if he struck the plaintiff.

TRIAL—INSTRUCTIONS—EVIDENCE TO AUTHORIZE. Instructions upon a theory as to an accident are properly refused if there was no evidence to sustain such theory.

¹Reported in 96 Pac. 4.

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• **APPEAL AND ERROR—REVIEW—VERDICTS—REFUSAL OF NEW TRIAL.** The opinion of the trial judge that he would have decided on the evidence contrary to the verdict of a jury does not show that the verdict should be set aside, where the judge stated that he would not hesitate to set it aside if he were at all certain that it was unjust, and that to do so would usurp the province of the jury.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered November 7, 1907, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits in an action for personal injuries. Affirmed.

E. R. York and T. W. Hammond, for appellant.

Ellis, Fletcher & Evans and Boyle, Warburton, Quick & Brockway, for respondent.

RUDKIN, J.—On the morning of June 18, 1906, the plaintiff and another employee of the city of Tacoma were engaged in sweeping Pacific Avenue, one of the public streets of that city. It is customary for men thus employed to do their work facing the direction from which teams and vehicles are required to come, and in accordance with this custom the plaintiff, who was sweeping the east side of the avenue, worked with his face to the south, while his companion on the opposite side of the street worked with his face to the north. As the plaintiff was thus engaged in the discharge of his duties, an automobile driven by the defendant struck him in the back, causing permanent injuries for which a recovery was sought in this action. From a judgment in favor of the plaintiff, this appeal is prosecuted.

The first error assigned is the admission in evidence of an ordinance of the city of Tacoma regulating traffic on the public streets, approved September 6, 1906. Section 1, of this Ordinance provides that,

“On all streets running north and south, or northerly and southerly [such is Pacific Avenue] vehicles driven south or southerly shall be kept to the west or westerly side of the center of such streets, and vehicles going in the opposite direc-

tion on such streets shall be kept to the east or easterly side of such streets."

The objection to the ordinance was that it was repealed by a later ordinance, regulating the use and rate of speed of automobiles, approved June 12, 1907. The later ordinance has no repealing clause, but it is contended that the following provision contained therein works a repeal of the earlier ordinance by implication.

"The driver or operator of any automobile or motor vehicle shall be governed by the commonly accepted rules of road traffic, by turning to the right when meeting vehicles or teams or persons moving or heading in the direction opposite to that in which he is moving, and by turning to the left-hand side in passing vehicles or teams or persons moving or heading in the same direction in which he is moving, and shall cause such automobile or vehicle to be moved in a careful manner so as not to endanger or inconvenience any person."

Repeals by implication are not favored in law, and it can be seen at a glance that there is no necessary conflict between the provisions of the two ordinances. A provision requiring a driver to pass another in a given manner, is not in conflict with an additional requirement that he shall keep on a certain side of the street while going in a given direction.

The admission of mortality tables in evidence is the next error assigned. The ground of the objection was that the age of the respondent was not shown, that such tables are based on the lives of men acceptable for insurance, not on the lives of mankind in general, and that such tables have no application to negroes. The testimony showed that the respondent was a negro, born in slavery, and that he had no very definite knowledge as to his age, except that he was between fifty and fifty-six years old. Mortality tables covering the expectancy of life between the ages of fifty-four and sixty were offered in evidence, and it was for the jury to determine the age of the respondent and the year of the tables

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that should apply. The record does not disclose the particular tables received in evidence, so that we cannot say that they were based on the lives of those acceptable for insurance only. We know that the Carlyle Tables, the Northampton Tables and others are based on the entire population of given localities for a given period, and we know that many others are constructed from statistics based on the experience of one or more insurance companies. For this reason we are unable to say that the tables offered in evidence belong to the one class or the other, but we prefer to rest our decision on broader grounds. We are at liberty to take judicial notice of the standard mortality tables, and a reference to them will show that the expectancy of life under the different tables at any given age does not differ widely. Thus, if we assume that the respondent was fifty-six years of age at the time of receiving the injury, his life expectancy under the Carlyle Tables is 16.89 years; under the American expectancy 16.72 years; under the Northampton tables 15.10 years; under Dr. Wiggleworth's tables 17.78, and under the tables offered by the respondent 16.7. All of these tables, with the possible exception of those offered by the respondent—and of those we have no knowledge—have been recognized as authoritative by the courts and received in evidence. While there is some difference in these different tables, yet an equal or even greater difference in the expectancy of life may arise from other causes. We know that mortality among males is greater than among females; we know that, as we proceed from the temperate to the torrid zone, mortality increases as we go south; that heat stimulates the vital functions so that maturity is reached earlier and decay commences earlier; we know that food, air, raiment, and environment are important factors in prolonging and shortening life. But notwithstanding these differences, the practice of admitting standard mortality tables in evidence whenever it becomes necessary to estimate the value of annuities, dower, curtesy, or damages

for wrongful act, has become too well established to admit of question, and the application of the rule governing their admission does not depend on race or color, time or place. Of course the tables are not binding on the jury. As said by the court in *Vicksburg etc. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257:

"In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. . . . But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and conscience of the jury. On the contrary, in the important and much considered case of *Phillips v. London & S. W. Ry.*, above cited, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof."

On the question of damages the court instructed the jury that they should take into consideration all the evidence in the case and all the facts and circumstances, and use their own good judgment in arriving at the amount which in their opinion would adequately compensate the respondent for his injury. It is claimed that the court by this instruction authorized the jury to go outside the evidence, and act upon their own independent judgment in assessing damages, but the instruction taken as a whole admits of no such construction.

The refusal of the court to instruct the jury that the presence of obstructions in the street would warrant the appellant in passing from the side on which he was required to travel to the opposite side is assigned as error. There was no error

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in the refusal of this instruction under the facts in this case. The issue was, did the appellant strike the respondent? If he did not, there was no cause of action. If he did, there was no defense, except as to the amount of the recovery. The appellant further requested the court to instruct the jury that if the respondent was struck by a dog and thrown in contact with the appellant's machine there could be no recovery. There was no evidence to sustain any such theory of the case, and the instruction was properly refused.

It is lastly contended that the evidence is not sufficient to sustain the verdict, and that the trial court expressed such disapproval of the verdict that it should have awarded a new trial. There was ample testimony on the part of the respondent to sustain the verdict, and all inquiry must end there so far as this court is concerned. While the trial judge did say, in passing on the motion for a new trial, that if the case had been tried before him without a jury he would have given judgment for the defendant, yet he added:

"This case is one in which each juror was as competent to arrive at a just conclusion, and understand and weigh the evidence, as was the court. If I felt at all certain that the verdict was unjust I would not hesitate to set it aside, but I have no such convictions. To set aside a verdict under such circumstances would be to usurp the province of the jury."

It requires no argument to show that the views of the learned trial judge were correct, and we will not pass on the motion to strike his opinion from the transcript. Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, Root, and MOUNT, JJ., concur.

DUNBAR and CHOW, JJ., took no part.

[No. 7372. Decided June 12, 1908.]

CHARLOTTE NORTHCRAFT *et al.*, *Respondents*, v.
I. BLUMAUER *et al.*, *Appellants*.¹

CONTRACTS—SALES—RESCISSON—MUTUAL MISTAKE—RELIEF—INJUNCTION—DAMAGES. Where a sale of standing timber was made upon the basis of a cruise by one Y. at one dollar per thousand feet, and after part of the same was removed, Y. discovered that he had made a mistake in the boundary lines, thereby omitting a large quantity of the timber, and notified the purchasers to make good therefor to the vendor, which they refused to do, the vendor is entitled to an injunction restraining further removal of the timber and for damages for the timber taken.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered July 30, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for an injunction and for damages. Affirmed.

Vance & Mitchell, for appellants.

Troy & Falknor, for respondents.

Crow, J.—Action by Charlotte Northcraft, in person and as guardian of Philip D. Northcraft, a minor, against I. Blumauer and the Blumauer Logging Company, a corporation, to enjoin the defendants from cutting and removing timber from certain land belonging to the plaintiffs, and to recover damages for timber already taken. From a final decree granting an injunction and awarding damages, the defendants have appealed.

Appellants insist that the trial court erred in denying their motion for nonsuit, and in entering judgment in favor of the respondents. The evidence shows that the respondents owned certain land in Thurston county upon a portion of which was a lot of growing timber which the respondent Charlotte

¹Reported in 96 Pac. 1118.

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Opinion Per CROW, J.

Northcraft caused to be cruised by one Yantis, who estimated it at 300,000 feet; that by mistake he incorrectly located the boundary lines, thereby omitting a portion of the land and a large quantity of the timber; that Yantis afterwards became an employee of the appellants; that while he was such employee he advised them that he had cruised the timber at 300,000 feet; that the respondent Charlotte Northcraft thereafter negotiated a sale of the standing timber to the appellant I. Blumauer; that during part of the negotiations Yantis acted as agent for appellants; that according to respondents' contention the sale was based upon the incorrect cruise of 300,000 feet made by Yantis, at the agreed price of one dollar per thousand, and that she received \$300 from Blumauer in payment.

The appellant I. Blumauer contends that he purchased the entire body of timber without regard to the number of feet involved or any fixed price per thousand, but we do not find that this contention is sustained by the preponderance of the evidence. The evidence further shows that, after a large portion of the timber had been removed, Mr. Yantis learned the correct boundary lines and discovered his mistake in making the cruise; that, from a subsequent cruise made by other parties employed by the respondents, it was ascertained that there had been a much larger quantity of timber upon the land; that thereupon Mr. Yantis directed the attention of the appellants to the mistake he had made, stated that it had entered into the contract of sale, and insisted that appellants should compensate respondents therefor; that they declined to do so; that he afterwards called the attention of respondents to the mistake, whereupon they, alleging mutual mistake, brought this action to rescind the contract, to enjoin the further removal of the timber, and to recover the value of that already taken.

The controlling issues before us are, whether, at the time the sale of the timber was made to the appellants by the re-

spondent Charlotte Northcraft, it was negotiated on the basis of 300,000 feet according to the Yantis cruise, at one dollar per thousand, and whether the parties thereby made a mutual mistake as to quantity. Although the trial court filed no findings of fact, it must have found these issues in favor of the respondents, holding that the sale was so negotiated and that a mutual mistake had been made. Although the evidence is conflicting, we think its preponderance fully sustains such findings. It is evident that, in ascertaining the amount of timber removed by the appellants, the trial court accepted the sworn statements of their own witnesses and fixed the same at 944,000 feet, of the value of \$944, upon which \$300 had been paid. The trial court therefore enjoined appellants from removing any further timber, and awarded respondents judgment for \$644 as damages for the timber taken. This judgment is supported by the evidence and law, and is therefore affirmed.

HADLEY, C. J., MOUNT, DUNBAR, RUDKIN, ROOT, and FULLERTON, JJ., concur.

[No. 7263. Decided June 13, 1908.]

N. N. HAGENESS *et al.*, *Respondents*, v. TACOMA RAILWAY & POWER COMPANY, *Appellant*.¹

APPEAL—REVIEW—VERDICTS. A verdict should not be set aside because against the weight of the evidence where there was sufficient competent evidence to sustain it.

DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict for \$2,000 for personal injuries to the leg and foot, resulting in chronic synovitis, is not excessive, where it appears that the plaintiff suffered continued pain up to the time of the trial, it was impossible for her to do her ordinary housework, the injury affected her earning capacity in giving music lessons, and she was put to considerable expense, and might need a surgical operation.

¹Reported in 96 Pac. 6.

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Opinion Per HADLEY, C. J.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 20, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries. Affirmed.

L. F. Chester, for appellant.

Raymond J. McMillan and *Frank H. Kelley*, for respondents.

HADLEY, C. J.—This is an action by a husband and wife to recover damages for injuries to the wife, alleged to have been received in a street car accident. The complaint alleges, that the injured plaintiff was a passenger upon one of the defendant's cars, and that she seasonably notified the conductor that she desired to leave the car at the corner of Ninth and C streets in Tacoma; that she had in her company a little son about four years of age; that the car stopped at the corner and she and her son prepared to leave it, but while she was still standing with one foot upon the car step and exercising care to protect herself and her son from injury, the car was negligently and prematurely started, and she and her son were thereby violently thrown to the ground, whereby she was injured in her left foot, left leg and ankle, and was severely strained and bruised in the lower part of her back and also about the abdomen. A trial was had before a jury, and a verdict was returned for plaintiffs in the sum of \$2,000. Judgment was entered for the amount of the verdict, and the defendant's motion for new trial having been denied, it has appealed.

It is first assigned that the court erred in overruling the motion for a new trial, for the reason that the verdict is against the weight of the evidence. It was for the jury to pass upon the weight of the evidence. There was sufficient competent evidence to sustain the verdict. There was testimony in support of the allegations of the complaint as above set forth, and although there was conflicting testimony, yet it

was the province of the jury to pass upon the reliability of all the evidence. The court did not err in denying the new trial on the ground of insufficiency of the evidence.

It is also urged that it was error to deny the motion for new trial without requiring a remittance from the amount of the verdict, for the reason that the verdict is excessive. We are not prepared to say that the amount is excessive. There was evidence that the injury resulted in chronic synivitis, the pain and interference from which is in direct proportion to the extent the limb is used. It was also testified that Mrs. Hageness suffered much and continued pain from the time of the injury up to the time of the trial; that it was impossible for her to do her ordinary work, and she was deprived of exercising her ordinary earning capacity by giving music lessons. It was shown that she was at considerable expense for medical care, nursing, medical supplies, and incidental expenses, made necessary by the injury. It was also testified that the injury has resulted in retroversion of the womb, which may require active surgical interference to remedy. Under these circumstances we shall not undertake to say that the amount of the verdict is excessive, and particularly so since the trial court, who heard the testimony and observed the witnesses, has declined to do so.

Several errors are assigned upon the court's instructions. We think it unnecessary to enter upon a discussion of these in detail. A careful reading of the charge of the court convinces us that in its entirety it was very clear and fair, and that the jury could not have been in any way misled thereby to the prejudice of appellant.

The judgment is affirmed.

RUDKIN, FULLERTON, CROW, ROOT, MOUNT, and DUNBAR,
JJ., concur.

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Opinion Per Curiam.

[No. 7287. Decided June 13, 1908.]

JAMES JENSEN, *Respondent*, v. WILLIAM F. SHEARD *et al.*,
Appellants, JOHN B. OVERFIELD *et al.*, *Respondents*.¹

APPEAL—DECISIONS REVIEWABLE—COSTS. Appeal does not lie upon a mere question of costs.

SAME—REVIEW—PARTIES ENTITLED—INVITED ERROR—DISMISSAL. Appellants cannot allege error in findings which are substantially identical with the findings requested by them; and that being the only error urged, the appeal will be dismissed.

Appeal from a judgment of the superior court for Pierce county, Miller, J., entered December 2, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose mechanics' liens. Appeal dismissed.

F. S. Blattner (*Frank H. Kelley*, of counsel), for appellants.

Theo. D. Powell, *Frederick H. Murray*, *Eugene Carr*, *H. R. Lea*, *Ira A. Town*, and *Wm. H. Pratt*, for respondents.

PER CURIAM.—In this action sundry parties, by complaint and cross-complaint, sought to foreclose liens for labor and material against certain real property owned by the defendant William F. Sheard, and from a judgment in favor of the several lien claimants, Sheard and wife have appealed.

The respondents have interposed a motion to dismiss on the ground that the findings of fact and conclusions of law made and entered by the court are identical with the findings and conclusions proposed by the appellants. A comparison of the findings made and the proposed findings, as set forth in the appellants' brief, shows this to be substantially true. The only difference we have been able to discover, aside from mere

¹Reported in 96 Pac. 2.

clerical errors, is that the appellants claimed costs in favor of the appellant Elizabeth Sheard, whereas, the court dismissed her from the case without costs. Should we assume that the court was in error in this regard an appeal will not lie to this court on a mere question of costs. Notwithstanding the identity of the findings made by the court with the findings proposed by the appellants, the latter have excepted to the findings as made, and to the refusal to find as requested, and assign error on the court's rulings. But it is a well settled rule of practice in all courts that a party will not be heard to complain of invited error or of rulings made at his request. *Gottstein v. Seattle Lum. & Com. Co.*, 7 Wash. 424, 35 Pac. 193; *Gilmore v. Baker Co.*, 12 Wash. 468, 41 Pac. 124; *State ex rel. Bickford v. Benson*, 21 Wash. 365, 58 Pac. 217; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022; 3 Cyc. 242 *et seq.*

Had the court signed the findings and conclusions proposed by the appellants, the judgment appealed from would follow as a matter of course, and for that reason the appellants cannot be heard in opposition to the judgment. The motion to dismiss is therefore granted. Since the submission of the case, certain persons who were not parties to the action have moved the court to strike their names from the notice of appeal, appeal bond and brief. The conclusion we have reached on the motion to dismiss renders a decision on this motion unnecessary. Appeal dismissed.

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Opinion Per RUDKIN, J.

[No. 7199. Decided June 13, 1908.]

SAMUEL C. KNOWLES, *Appellant* v. MARY S. TEMPLE,
*Respondent.*¹

MUNICIPAL CORPORATIONS—ASSESSMENTS—LIEN—WHEN ATTACHES—COVENANTS. An assessment upon abutting property for a local improvement does not become a lien on the property, so as to constitute a breach of a covenant against incumbrances, until the assessment roll is placed in the hands of the officer authorized to collect the assessment, under the express provisions of Laws 1901, p. 240, § 1.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered August 3, 1907, upon findings in favor of the defendant, after trial on the merits before the court without a jury, in an action for breach of covenant against incumbrances. Affirmed.

T. W. Hammond, for appellant.

Walter Loveday, for respondent.

RUDKIN, J.—On the 5th day of September, 1906, the city council of the city of Tacoma adopted a resolution of intention to improve one of the city streets, and created an assessment district for that purpose. At that time the defendant was the owner of certain lots abutting on the street to be improved and included within the assessment district. On the 27th day of December, 1906, she conveyed the lots to the plaintiff, covenanting that they were free and clear of all liens, charges and incumbrances. Work was commenced on the improvement on November 7th, 1906, and the improvement was completed on February 12, 1907. On the 28th day of February, 1907, the assessment roll in the matter of the improvement was confirmed by the city council, and on March 1st, 1907, the roll was placed in the hands of the city treasurer for collection. The assessment against the lots in ques-

¹Reported in 96 Pac. 1.

tion, amounting to the sum of \$295.75, was thereupon paid by the plaintiff, and this action was instituted to recover the amount from the defendant under the covenant against liens, charges, and incumbrances contained in the deed. From a judgment in favor of the defendant, the plaintiff has appealed.

The appellant contends that the lien of the assessment attached at the inception of the proceedings for the improvement of the street, the resolution of intention in this case, and that a breach of the covenant of warranty was therefore established. The respondent, on the other hand, contends that the lien did not attach until the assessment roll was placed in the hands of the city treasurer for collection, under the provisions of the act of March 16, 1901, Laws of 1901, p. 240, or until the completion of the improvement, under the rule announced by this court in *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879.

No lien for general taxes or special assessments exists by virtue of the common law. Such liens are purely of statutory origin, and we must look to the statute for the time of their commencement and their duration. As said by this court in *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31:

"It will not be disputed, we think, that tax levies are purely statutory; and it is for the legislature to determine the time when the lien shall attach, and to settle all questions of public policy of that kind. The general rule is that taxes are not a lien unless expressly made so, and when liens are expressly created, they are not to be enlarged by construction."

Acts creating liens on property benefited by local improvements may not fix the time when the lien attaches, and in such cases the courts must determine that fact from a consideration of the entire act. When no time is fixed it is sometimes held that the lien attaches when the improvement is ordered, sometimes when the improvement is completed, and sometimes when the amount of the assessment or charge is fixed or de-

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Opinion Per RUDKIN, J.

termined, as the legislative intent may appear. *Blackie v. Hudson*, 117 Mass. 181; *Green v. Tidball, supra*; *Harper v. Dowdney*, 118 N. Y. 644, 21 N. E. 63.

But when the legislature has declared that the lien shall attach at a given time or upon the happening of a given event, any attempt on the part of the courts to fix a different time would be judicial legislation. Section 1 of the act of 1901, *supra*, provides that:

“Such charge when assessed and the assessment roll confirmed by the legislative body of such city in the manner provided, or to be hereafter provided, by ordinance or city charter shall be a lien upon the property assessed from the time said assessment roll shall be placed in the hands of the officer authorized by law or the charter and ordinances of such city to collect such assessment.”

Under the express provisions of this section there was no lien on the lots in question at the time the covenant against incumbrances was entered into, and the covenant being *in praesenti* was broken when made if at all.

In the case of *Green v. Tidball, supra*, the court held that the liability of the property for the assessment accrued at the completion of the improvement, and that the right of the city to make the assessment constituted an incumbrance. The facts in that case were peculiar. The improvement had been completed and an assessment levied long before the conveyance, but the assessment was thereafter declared invalid by a decision of this court and a reassessment made after the conveyance. Under these facts the court held that the grantor had received the benefit of the improvement, that the liability of the property to assessment accrued upon the completion of the improvement, and that the right vested in the city to make a reassessment constituted an incumbrance. But the doctrine that the liability for the assessment accrues upon the completion of the improvement cannot be extended to a case of this kind; first, because it entirely ignores the provision

of the statute fixing a different date; and second, because the rule in itself is open to serious objection. As said by Magie, J., in *Cadmus v. Fagan*, 47 N. J. L. 549, 4 Atl. 323, referring to the rule that the lien attaches upon the completion of the assessment roll under the New Jersey statute:

"This construction, it is not amiss to note, establishes a convenient rule capable of practical application. The date when the lien attaches is, under this rule, discoverable by record evidence. Under the rule stated by the supreme court, it could only be fixed by parol evidence, which, in respect to the completion of the work, might be uncertain or even variant."

See, also, *Everett v. Marston*, 186 Mo. 587, 85 S. W. 540; *Cemansky v. Fitch*, 121 Iowa 186, 96 N. W. 754. In the latter case the court said:

"One of the objects of the legislature in defining precisely when the lien for street improvements attach to the abutting property must have been the determination of the liability therefor as between grantor and grantee in such a deed, and we perceive no reason for not giving the statute full effect."

The doctrine that the mere inchoate right to levy a tax or assessment constitutes an incumbrance cannot be accepted as one of general application. *Everett v. Marston, supra.*

We are therefore of opinion that the assessment was neither a lien nor an incumbrance at the time of the conveyance under which the appellant claims, and the judgment is accordingly affirmed.

HADLEY, C. J., FULLERTON, CROW, ROOT, MOUNT, and DUNBAR, JJ., concur.

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Opinion Per RUDKIN, J.

[No. 7283. Decided June 15, 1908.]

**PIERCE COUNTY, Appellant, v. JOHN H. BUNCH, Respondent,
and TRADERS TRUST COMPANY OF TACOMA, Appellant.¹**

APPEAL—DECISIONS REVIEWABLE—FINALITY—VACATION OF TAX SALE. An order vacating a tax foreclosure judgment and tax sale and deed is appealable by the purchaser at the tax sale who was not a party to the suit, as a final order determining his rights, since he could not assert rights in the tax case or appeal from the judgment.

APPEAL—RIGHT TO APPEAL—WAIVER OF OBJECTION. The objection that the purchaser at a tax sale was not made a party by order of intervention, upon a motion to vacate the tax judgment, cannot be first raised in the supreme court.

APPEAL—RIGHT TO APPEAL—PARTIES IN INTEREST—TAX TITLE PURCHASER. A purchaser at a tax sale is a party in interest and entitled to appeal from an order vacating the tax foreclosure judgment.

TAXATION—TAX JUDGMENT—VACATION—NOTICE TO PURCHASER. A tax foreclosure judgment cannot be vacated after the tax sale without notice to the purchaser.

JUDGMENT—VACATION—RES JUDICATA—DENIAL OF VACATION—CONCLUSIVENESS. Where a motion to vacate a judgment is denied on the ground that the motion was improper and the rights of the parties could not be adjudicated in such a proceeding, it is *res adjudicata* upon that question, although not made on the merits; and the court cannot grant a second motion to vacate based on the same grounds.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered December 26, 1907, in favor of defendant, granting defendant's motion to vacate a tax foreclosure judgment and tax sale after overruling special objections and a hearing upon affidavits. Reversed.

Wm. H. Pratt, for appellants.

F. Campbell and E. L. Culver, for respondent.

RUDKIN, J.—On the 5th day of December, 1906, a tax judgment was entered in the superior court of Pierce county

¹Reported in 96 Pac. 164.

in a certain action entitled Pierce County against Alexander and others, by virtue of a stipulation between the county attorney and the attorney for the respondent, Bunch, who was the owner of the property affected by the judgment. Pursuant to this judgment, the county treasurer sold the property to the appellant Traders Trust Company, on the 22d day of December, 1906, and executed and delivered a tax deed therefor. Thereafter and on the 27th day of May, 1907, the respondent moved to vacate the tax judgment for the reason that the judgment was void and the court without jurisdiction to enter the same. This motion was supported by the affidavit of the deputy prosecuting attorney of the county at the time of the entry of the tax judgment, setting forth that the judgment was entered in the wrong cause by mistake, that the affiant had agreed to notify the respondent of the entry of the judgment but had failed to do so by reason of the fact that the memorandum relating to such notice was deposited in the wrong jacket, and other matters not deemed material. Service on this motion and the accompanying affidavit was accepted by the county attorney and by the attorney for the appellant Traders Trust Company as purchaser at the tax sale. The appellant Traders Trust Company appeared specially and resisted the motion to vacate, on the ground that the respondent was not a party to the action in which the judgment was rendered, and had not been made a party or allowed to intervene; that the court was without jurisdiction to entertain the motion; that the motion was improperly and improvidently made; and that such a proceeding was not a proper one in which to try out and determine the rights of the respondent and appellant Traders Trust Company as purchaser at the tax sale.

These objections were supported by the affidavit of the president of the Traders Trust Company, but the subject-matter of the affidavit is not at this time material. The motion to vacate and the objections thereto were heard on the

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11th day of September, 1907, and the court entered the following order, omitting the title of the court and cause:

"This cause coming on to be heard on this day on the motion of John H. Bunch, for an order setting aside the judgment in this cause entered against said defendant, foreclosing the taxes on lot one (1) to six (6) inclusive, block 7809, city addition to Tacoma, Pierce county, Washington, said defendant appearing by his attorney F. Campbell and E. Culver, and the objections thereto by the Traders Trust Company of Tacoma, appearing specially by its attorney Wm. H. Pratt, and the court having listened to and heard the arguments of counsel, and being fully advised in the premises, and it appearing to the court that said motion is improperly made, and that this is not a proper proceeding in which to try the rights of the said John H. Bunch and of the Traders Trust Company in and to the property therein set forth. *It is therefore ordered* that said motion be denied, to which said defendant John H. Bunch excepts and his exception is allowed."

Notice of appeal was given from this order, but the appeal does not appear to have been further prosecuted. On the 2d day of October, 1907, the respondent again moved to vacate the judgment on the ground that the judgment was void and the court without jurisdiction to enter it, but the reasons for the invalidity of the judgment and the want of jurisdiction were stated more fully than in the previous motion. The second motion was supported by the identical affidavit filed in support of the first.

The appellant the Traders Trust Company again appeared specially and objected to the hearing of the motion, on the general grounds urged against the hearing of the former motion, and on the further ground that the motion had been once heard and denied, as heretofore stated. The affidavit filed in support of the former objections was again filed by the appellant Traders Trust Company. On the 26th day of December, 1907, the second motion to vacate was granted, and from the order of vacation this appeal is prose-

cuted by Pierce county and by the Traders Trust Company, the purchaser at the tax sale.

The respondent has moved to dismiss the appeal as to both appellants and as to each of them. The grounds of the motion as to appellant Traders Trust Company are, first, that the order is not appealable; second, that said appellant is not a party in interest and obtained no order allowing an intervention; third, that the order vacating the judgment does not affect said appellant and is not final or binding upon it; and fourth, because said appellant appeared specially in the court below. The ground of the motion to dismiss as to the county is, among others, that the order is not appealable. In so far as the county is concerned, perhaps the order is not appealable; but, inasmuch as a reversal in favor of the other appellant will inure to the benefit of the county from the necessities of the case, we deem it unnecessary to discuss that question. We will therefore consider the appeal of the Traders Trust Company alone, and will hereafter refer to that company as if it were the sole appellant.

The rule governing appeals from orders vacating judgments is thus stated in *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 912:

"If an order vacating a judgment, or quashing a summons or the service thereof, is or may be followed by further proceedings in the cause, and the entry of a final judgment therein, such order may be reviewed on appeal from the final judgment, and is not itself appealable. If, on the contrary, the order vacating the judgment, or quashing the summons or the service thereof, in effect determines the action or proceeding and prevents a final judgment therein, the order itself is a final one, and is therefore appealable."

Under this rule the order vacating the judgment in question is appealable. The appellant was brought into this proceeding but has no interest in or control over the original action. The right which it now asserts cannot be asserted in the tax case nor on appeal from the tax judgment. While

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the proceeding is in name a motion to vacate a tax judgment, so far as the appellant is concerned it is in substance and effect a proceeding to set aside a tax sale and tax deed. Had such relief been sought in an independent action, there is no doubt that a right of appeal would exist, and the appellant should not be deprived of that right because its title was adjudicated under the guise of a motion interposed after judgment in an action to which it was not originally a party. For these reasons the order is, in effect, final as to the appellant, and is therefore appealable.

The objection that the appellant was not made a party by order of intervention and that it appeared specially in the court below, cannot be raised for the first time in this court. The objection that the appellant is not a party in interest, and that the order vacating the judgment is not final or binding as to it is not tenable. It should require no argument to show that a purchaser at tax sale is vitally interested in a proceeding which vacates the tax judgment and sale, for if the tax judgment and sale be legally vacated the tax title utterly fails. Whether the appellant is bound by the order setting aside the sale depends on whether it was a party to the proceeding. We have already held that it was a party, but if it were not, the judgment should not have been vacated without notice to it. *Ryno v. Snider*, ante p. 421, 95 Pac. 644. We are therefore of opinion that the motion to dismiss is not well taken on any of the grounds suggested, and the same is accordingly denied.

On the merits, we will first consider the objection that the previous order denying the motion to vacate was a bar to the present proceeding. The respondent contends that it was not for several reasons: First, because of the rule announced by this court in *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272; second, because the former motion was not determined on the merits; and, third, because the latter motion was based on grounds not specified in the former. In *Clein v. Wand-*

schneider, so far as the opinion discloses, the court regarded an objection that the motion to vacate the judgment was based on the same grounds as a previous motion in the same cause which had been denied by the court, as a technical question of practice without substantial merit.

This case was followed in *State ex rel. Rucker v. Superior Court Snohomish County*, 18 Wash. 227, 51 Pac. 365. But in *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363, it was held that, after the denial of a motion for a new trial, neither the judge making the order nor his successor in office, has jurisdiction to consider a second motion based on the same grounds. The *Clein* case was distinguished on the ground that the motion in that case was based on mistake, inadvertence, surprise, and excusable neglect. In *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955, it was held that an order denying a motion to vacate a judgment is a bar to a subsequent action to cancel the judgment based on the same grounds. The same rule was announced in *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748. In *Wilson v. Seattle Dry Dock & Ship Bldg. Co.*, 26 Wash. 297, 66 Pac. 384, it was held that an order denying a motion to vacate a judgment is *res adjudicata* against any subsequent proceeding seeking the same relief.

In *Coyle v. Seattle Elec. Co.*, 31 Wash. 181, 71 Pac. 733, it was held that after a court grants a new trial it cannot set aside its former order and deny the new trial for mere error in its previous ruling, and the *Clein* case was again distinguished. It is therefore firmly established by the decisions of this court that an order denying a motion to vacate a judgment is a bar to any subsequent proceeding seeking the same relief, and if the *Clein* case cannot be distinguished for the reasons stated in later cases it must be considered as overruled.

The contention that the first order was not on the merits is in a measure true. It was in the nature of a judgment on

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the pleadings. But while such an order may not be conclusive on the merits, it was nevertheless conclusive on the particular ground on which the order was made. 23 Cyc. 1231. The first order decided that the proceeding to vacate the judgment by motion was improper and that the rights of the parties could not be adjudicated in such a proceeding. To that extent and upon these questions the order was clearly *res adjudicata*. The record now presents this anomalous spectacle. Two orders have been entered in the court below, the one holding that procedure by motion is improper, and the other holding exactly the contrary. Both of these orders are final and neither has been vacated by this court or by the court in which the orders were made. When the first order was denied, three courses were left open to the respondent. He might appeal from the order denying the motion to vacate, he might move the court to vacate its own order on some statutory ground, or he might abide by the decision and pursue some other remedy. Instead of this, he ignored the first order entirely and proceeded as though it had never been made and did not exist. If such a practice is permitted, the denial of one motion will but lead to the interposition of another and there will be no end to litigation. The contention that the second motion was based on different grounds from the first is not supported by the record, for, as stated above, the same affidavit, setting forth the contentions of the respondent in detail, was attached to each motion and was necessarily a part thereof.

We are therefore of opinion that the objection to the hearing of the second motion should have been sustained, and for the error of the court in failing so to do, the judgment is reversed, with directions to dismiss the action.

HADLEY, C. J., FULLERTON, MOUNT, and Root, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7312. Decided June 15, 1908.]

**ROBERT KELLY, Respondent, v. JOHN P. COWAN *et al.*,
Appellants.¹**

CONSTITUTIONAL LAW—JUDICIAL POWER. The courts are bound to apply the law as made by the legislature, without putting humanitarian considerations above it.

MASTER AND SERVANT—PERSONAL INJURIES—SAFE PLACE—ASSUMPTION OF RISKS—EVIDENCE—SUFFICIENCY. An employee in the construction of a building, struck by a falling brick, assumes the risk as a matter of law, where it appears that while he would be engaged in putting a wheelbarrow of brick on one elevator at the bottom of the shaft, another employee at the top of the shaft would be removing another load from the other elevator, that he knew that bricks were liable to be jostled off from the load and fall down the shaft, and a brick was jostled and fell, the elevator platform not being flush with the upper floor.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered October 1, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Hudson & Holt, for appellants, contended, that whatever negligence existed, was not by reason of failure to provide a safe place, but by failure to provide safe appliances. *Wagner v. New York etc. R. Co.*, 76 App. Div. 552, 78 N. Y. Supp. 696; *Fink v. Slade*, 66 App. Div. 105, 72 N. Y. Supp. 821; *Connors v. Holden*, 152 Mass. 598, 26 N. E. 187; *Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *Penner v. Vinton Co.*, 141 Mich. 77, 104 N. W. 385; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *Stourbridge v. Brooklyn City R. Co.*, 9 App. Div. 129, 41 N. Y. Supp. 128. The obligation of the master to furnish reasonably safe appliances did not impose the duty of keeping the building in a safe condition at every moment of the work so far as safety depended upon due per-

¹Reported in 96 Pac. 152.

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Citations of Counsel.

formance by the servants and their fellows. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Kreigh v. Westinghouse, Church, Kerr & Co.*, 152 Fed. 120, 11 L. R. A. (N. S.) 684; *American Bridge Co. v. Seeds*, 75 C. C. A. 407, 144 Fed. 605, 11 R. A. (N. S.) 1041. It is sufficient if he used machinery in common use, and he is not bound to use the newest and best appliances. *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Imhoof v. Northwestern Lumber Co.*, 43 Wash. 387, 86 Pac. 650; Note to 98 Am. St. 292; *Hale v. Cheney*, 159 Mass. 268, 34 N. E. 255; *Titus v. Bradford etc. R. Co.*, 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. 944; *O'Neill v. Chicago etc. R. Co.*, 66 Neb. 638, 92 N. W. 731, 60 L. R. A. 443, 1 Am. & Eng. Ann. Cases 337; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Young v. Mason Stable Co.*, 96 App. Div. 305, 89 N. Y. Supp. 349; *Shadford v. Ann Arbor St. R. Co.*, 111 Mich. 390, 69 N. W. 661; *Innes v. Milwaukee*, 96 Wis. 170, 70 N. W. 1064; *Davis v. Augusta Factory*, 92 Ga. 712, 18 S. E. 974; *Kern v. DeCastro & Donner Sugar Ref. Co.*, 125 N. Y. 50, 25 N. E. 1071; *Quigley v. Levering*, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62; *Geoghegan v. Atlas Steamship Co.*, 22 N. Y. Supp. 749; *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. 633, 13 L. R. A. 374; *Westinghouse Elec. & Mfg. Co. v. Heimlich*, 127 Fed. 92; *Mississippi River Logging Co. v. Schneider*, 74 Fed. 195. The dangers were as obvious and apparent to the servant as to the master, and he assumed the risks. *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N. S.) 283; *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711; *Imhoof v. Northwestern Lumber Co.*, 43 Wash. 387, 86 Pac. 650; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 63 L. R. A. 551; 4 Thompson, Negligence, § 3393; *King v. Ford River Lumber Co.*, 93 Mich. 172, 53 N. W. 10; Note to 97 Am. St. 886; *Pressly v. Dover Yarn Mills*, 138 N. C. 410, 51 S. E. 69; *Mississippi River*

Logging Co. v. Schneider, 74 Fed. 195; *Anderson v. Inland Telephone etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Steeple v. Panel & Folding Box Co.*, 33 Wash. 359, 74 Pac. 475; *Shields v. Robins*, 3 App. Div. 582, 38 N. Y. Supp. 214; *Kern v. DeCastro & Donner Sugar Ref. Co.*, *supra*.

Gornor Teats, for respondent, contended, that it is the duty of the master to furnish a safe place in which to work. *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182; *Melse v. Alaska Commercial Co.*, 42 Wash. 356, 84 Pac. 1127; *Sullivan v. Wood & Co.*, 43 Wash. 259, 86 Pac. 629; *Smith v. Dow*, 43 Wash. 407, 86 Pac. 555; *Pioneer Fireproof Construction Co. v. Howell*, 189 Ill. 123, 59 N. E. 535. The plaintiff was not a fellow workman of the man at work on the fifth floor. *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814. The concurrent negligence of a fellow workman is no defense. *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398, and cases cited. Nor is customary negligence or common use a defense. *Carlson v. Wilkeson Coal & Coke Co.*, 19 Wash. 473, 53 Pac. 725; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; *Towle v. Stimson Mill Co.*, 33 Wash. 305, 74 Pac. 471; *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808; *Williams v. Spokane Falls & Northern R. Co.*, 39 Wash. 77, 80 Pac. 1100; *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905; *Roy Lumber Co. v. Donnelly*, 31 Ky. Law 601, 108 S. W. 255. The plaintiff did not assume the risks. *Shoemaker v. Bryant Lum. & Shingle Mfg. Co.*, 27 Wash. 37, 68 Pac. 380; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091; *Currans v. Seattle & San Francisco R. & Nav. Co.*, 34 Wash. 512, 76 Pac. 87; *Smith v. Dow*, *supra*; *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86

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Pac. 646; *Sturgeon v. Tacoma Eastern R. Co.*, 48 Wash. 366, 93 Pac. 526.

Root, J.—This is an appeal from a judgment allowing damages for a personal injury received by respondent while working for appellants, who were contractors engaged in the erection of a high building in Tacoma. In the building were two platforms, side by side, which were raised and lowered by means of cables, and used for carrying brick and other builder's material from the ground up to those portions of the upper floors where said material was being used. They were of the character in common and general use for such purposes. These platforms or elevators were so constructed that when one went up the other came down. At the time of the accident, brick was being carried up by means of these elevators. A wheelbarrow loaded with brick would be placed upon one of the platforms, which would then be elevated to the upper floor where the wheelbarrow and brick would be removed from the platform or elevator to the floor of the building, and moved to where needed. While a man at the top was removing the brick, the respondent would place another wheelbarrow loaded with brick upon the other platform at the bottom of the elevator shaft. At this particular time, it is claimed that the platform at the top was not quite flush with the upper floor of the building, and that, as the wheelbarrow was being removed from the platform to the floor of the building, the brick were jostled in such a manner as to cause one of them to slide or fall from the barrow down the elevator shaft, where it struck respondent. The latter had been working on this building for about two weeks, and had, at various times during the past nine months, been engaged in working about buildings in course of construction. He testified that he had seen a man with a wheelbarrow and load of brick fall down a shaft, and that he had been told that another man had narrowly escaped injury from the falling of a brick some time

before, in the same shaft where he was injured. Respondent contends that the appellants were negligent in not giving him a safe place to work, and keeping the place reasonably safe. He also contended in the lower court that the failure of the man above to have the elevator come flush with the upper floor before removing the wheelbarrow was a breach of a non-delegable duty of the master. The trial court, however, held that the man on the upper floor was a fellow servant of respondent, and that the latter could not recover by reason of any negligence of such fellow servant. The correctness of this holding is not presented for our consideration.

The appellants urge that, inasmuch as the danger which occasioned respondent's injury was one that was open, apparent, and known to him, he cannot recover. Respondent's attorney urges strongly upon us a consideration of the "humanitarian side" of the question. We do believe in giving consideration to the "humanitarian side" in deciding personal injury, and all other, cases; but we cannot put such considerations above the law, nor permit our feelings of sympathy to override the law by making radical changes therein which the people have not authorized us to make. Argument for the elimination or radical modification of such principles as are involved herein should be addressed to the legislature. That body is, by the people, through their constitution, given the power of legislation. The courts are not vested with such authority. We are in duty bound to apply the law as we find it.

The principles of law controlling a case like the one at bar are well settled. The servant assumes the risk of dangers that are to him open, apparent, and known. In this case the respondent could see the condition of his working place. He knew that bricks handled by the method employed were liable to occasionally fall down the shaft, as he testified that sometimes he piled the bricks regularly and sometimes threw them into the wheel-

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barrow in a haphazard manner. He had been told that another workman had recently narrowly escaped injury from a brick thus falling down one of these identical shafts. He knew that there was no covering over either of the platforms. He had seen a man and load of bricks fall. He knew that one platform was at the top, while the other was at the bottom, and that while he was placing a load of bricks upon the lower platform his fellow servant was removing another load from the upper platform. However negligent the master may have been in having the work done in this manner, it is evident that all of the dangers of the situation could easily be seen, understood, and appreciated by the respondent, and that he knew of them. This being true, the doctrine of assumed risk applies, and a recovery is defeated. It would doubtless be a good statute that would require protection for working men employed as was this respondent, and such a statute could defeat the defense of assumed risk; but until there is legislation of this kind, we have no discretion but to follow the law as we now find it.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

CROW, MOUNT, RUDKIN, and FULLERTON, JJ., concur.

[No. 7173. Decided June 15, 1908.]

J. T. VOIGHT, *Appellant*, v. FIDELITY INVESTMENT COMPANY,
Respondent.¹

VENDOR AND PURCHASER—CONTRACT—CONCURRENT COVENANTS—FORFEITURE—TENDER OF DEED—NECESSITY. In a contract of sale of land, a covenant to convey and a covenant to pay the first installment are not concurrent, where the deed was not to be made until years after on payment of the last installment, and tender of a deed is not necessary before forfeiture for nonpayment.

SPECIFIC PERFORMANCE—FORFEITURE—EXCUSE FOR DEFAULT. Specific performance of a contract cannot be asked by a vendee who had refused to accept the contract for a defect in the description, after forfeiture by the vendor on account of such refusal.

VENDOR AND PURCHASER—CONTRACT TO CONVEY—ABANDONMENT—FORFEITURE—SPECIFIC PERFORMANCE. A contract for the conveyance of land must be considered abandoned by the vendee, where, after making a payment of \$100 and agreeing to pay \$100 every six months, and all taxes, he made no further payments, paid no taxes, and quit the possession, for three years, and service of declaration of forfeiture upon him had become difficult by reason of his change of residence; hence specific performance will not be decreed upon his subsequent offer to perform.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 14, 1907, upon granting a nonsuit, after a trial on the merits before the court without a jury, dismissing an action for specific performance. Affirmed.

John E. Humphries and Geo. B. Cole, for appellant.

E. R. York, for respondent.

DUNBAR, J.—This is an action by the appellant against the respondent, to enforce specific performance of a contract for the sale of real estate. The contract of sale upon which the complaint was based was made and entered into on the 8th day of September, 1903, and was, in substance, to the

¹Reported in 96 Pac. 162.

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effect that the defendant contracted to sell certain land in King county to the plaintiff for the sum of \$1,000, \$100 to be paid down at the office of the defendant, \$100 on the 10th day of each and every sixth month thereafter until the sum of \$1,000 had been paid in full, together with interest at the rate of seven per cent per annum on all unpaid sums, interest to be paid semi-annually; the plaintiff contracting to pay all taxes and assessments which would thereafter be lawfully imposed on said premises, beginning with the taxes for the year 1903, the year in which the contract was made; providing that all improvements should remain upon the premises described, and providing that, in case of the punctual payment by the plaintiff of the payments therein stipulated to be made, the defendant would execute a deed to the plaintiff for the land described; providing specially that time was declared to be of the essence of the contract.

The complaint set forth in substance the terms of the contract, and alleged that plaintiff had expended more than \$200 upon the land described, that he notified the defendant that he was ready, able, and willing to comply with the terms of the contract on his part, and that the defendant failed and refused to comply with the contract. Plaintiff demanded that the defendant be required to deed to plaintiff the land in dispute, and that on its failure to do so, he have judgment against it for \$500 profit which he claimed, and for \$200 expenses and interest, and for the \$100 paid, with interest from time of payment. The answer admitted the execution of the contract, alleged that the plaintiff had wholly failed and refused to make the payments specified in the contract, or to pay the taxes specified therein, and denied many of the matters set up in the complaint. It also alleged the abandonment of the premises and of the contract by the plaintiff. The reply put in issue the affirmative matters of the answer. Upon the trial of the cause by the court, and upon the completion of the introduction of testimony by the

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plaintiff, defendant moved for a nonsuit, which nonsuit was granted by the court. Judgment of nonsuit was entered and appeal follows.

The appellant relies upon the case of *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, where it was held that the covenants in a contract of sale of real estate on the part of the vendors to convey the property and take back a mortgage upon the payment of the second installment, and on the part of the vendees to make such payment, are mutual, concurrent, and dependent, although the contract provides that the vendees shall first pay; and that no action to declare a forfeiture of the contract for nonpayment of the installment can be maintained by the vendors without executing and tendering a deed. But in this case the respondent was under no obligation to tender or execute a deed until all the payments had been made, and the last of the deferred payments was not due until March, 1908, a period of two years after the commencement of this action. Consequently the covenant to convey and the covenant to pay the first installments could not be concurrent. In addition to this, the decision of controversies of this character must of necessity depend largely upon the circumstances surrounding each particular case. The cases are of equitable cognizance and the rules governing them must be more or less flexible. In *Stein v. Waddell*, *supra*, the action was brought to declare a forfeiture. The defendants had paid \$5,000 down on a \$20,000 contract. The contract was entered into on February 3, 1902, when the first payment of \$5,000 was made, and the next payment of \$5,000 was to be made on or before August 3, 1903, the remaining \$10,000 on or before February 3, 1904, or one year from the date of the contract; and upon the payment to the grantor of the second installment, the grantor agreed to execute a deed to the grantees and take a mortgage back for the remaining \$10,000. The defendants, it is true, did not make the second payment according to the strict terms of the contract, but

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they had paid \$900 in installments, the last installment being paid September 18, 1903, and the action to declare a forfeiture was commenced October 10, 1903, two months and seven days after the default, and only a few days after acceptance by the plaintiffs of the partial payment made by the defendants. In concluding the opinion in that case, the court said:

"The respondents in this case did not insist on a strict performance by the appellants. They accepted a partial payment on the contract some six weeks after the cause of forfeiture accrued, and within three weeks thereafter this action was brought. Under such circumstances, a court of equity should insist upon a strict compliance with the terms of the contract, on the part of one invoking its aid to declare a forfeiture."

But in this case it is easily determined from the appellant's own testimony that there was an actual abandonment of the contract, and while there was some little misunderstanding as to the description of the land at first, this cannot be urged by the appellant, for the contract that he was then objecting to is the contract which he is now seeking to compel a performance of; and it can also readily be gathered from his testimony that, by reason of changing his residence, it would have been difficult after the first few months for the respondent to have served notice of the declaration of forfeiture upon him. We think, when it was shown that the appellant had made no payments whatever which were provided for in the contract, had not paid the taxes which he had contracted to pay, and had quit the possession of the land, all for nearly three years, that the court was justified in concluding that there had been an actual abandonment of the contract on the part of the appellant, and in granting the nonsuit prayed for. In this western country, where real estate values are fluctuating, owing to the rise and fall of what are provincially termed "booms," to allow a party to contract for the purchase of land, making thereon a small payment and contract-

ing to make other payments in the near future, and to pay no attention to his covenants for a term of years until it develops whether the land is to become valuable or not, while during this time the grantor is bound by the contract, would be working an injustice upon the rights of citizens, and such a practice should not be tolerated.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, FULLERTON, and CROW, JJ., concur.

[No. 7339. Decided June 15, 1908.]

ROBERT GARTHLEY *et al.*, Respondents, v. SEATTLE ELECTRIC COMPANY, Appellant.¹

DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict for \$4,000 for personal injuries sustained by a married woman, thirty-nine years of age, of unusually good health and extraordinary bodily strength, is not excessive where it appears that, at the time of the trial, she was in a neurasthenic condition, and honestly so, according to the opinions of the doctors, that her hair had turned from coal black to gray, that she suffered for three months to such an extent that she could not leave her bed, and had constantly since suffered, was not able to do her housework, had become prematurely old and had lost her sexual powers, the verdict having been reduced by the trial judge, who heard and saw her and the witnesses, from \$5,410 to \$4,000.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 5, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries. Affirmed.

James B. Howe and Henry S. Elliott, for appellant.

Frederick R. Burch and Robert H. Lindsay, for respondents.

¹Reported in 96 Pac. 155.

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DUNBAR, J.—Action for damages for personal injuries, alleged to have been sustained by reason of the negligence of appellant in conducting its street car in the city of Seattle. The case was tried to a jury, and a judgment rendered in the sum of \$5,410. On motion for a new trial, the trial court entered an order granting a new trial unless respondents would remit from the verdict the amount in excess of \$4,000. Respondents remitted such excess, and judgment was entered against appellant for \$4,000 and costs. This appeal is from that judgment.

The main contentions of the appellant are that the judgment is still too large, that the superior court erred in not granting appellant's motion for a new trial on the ground that the verdict was so grossly excessive as to show that it was the result of prejudice and passion, and erred in not requiring the amount of the verdict in excess of \$1,500 to be remitted. The testimony showed that the respondent Jane Garthley was, at the time of the accident, a woman thirty-nine years old, a woman of unusually good health and of extraordinary strength of body; that at the time of the trial she was in reality a physical if not a mental wreck. It was testified to by the doctor who had attended her from the time of the accident until the time of the trial and was still in attendance upon her, and also by the doctors who were appointed by the court to examine her and who were introduced by the respondents, that said respondent was in a neurasthenic condition. Neurasthenia is characterized by a group of symptoms commonly known as nervous exhaustion. It is true the doctors testified that there were no objective symptoms of this disease, and that their determination of the fact that the respondent was suffering from this disease was largely induced by the statement and actions of the respondent herself; yet they testified that, in their opinion, she was honest in her statements, and that there was no indication of fraud or pretense on her part.

The testimony shows that, at the time of the accident, her hair was coal black, and that between the time of the accident and the trial it had turned gray; that she had suffered for three months to such an extent that she was unable to leave her bed, and that the suffering had continued at intervals of from two to three days in each week ever since; that from a woman of remarkable strength and activity, she had degenerated into a woman who was not able to do her house-work, who was in constant pain, who had to be waited upon almost like a child by her husband and her daughter, who had become prematurely aged, and who had lost her sexual powers and desires. Whether or not this woman was suffering from neurasthenia, it is evident that she suffered greatly from the injuries which were the probable result of the accident; that she was still suffering, and would probably continue to do so for many years, if indeed her injuries were not permanent. The judge who tried the cause, who saw this witness on the stand and heard her testimony in relation to her pitiful condition, estimated the damages at \$1,000, and from a reading of all the testimony, both of the respondents and the appellant, we are not prepared to say that the estimate was too large. The objections to the testimony offered seem to be without merit. There are no objections to the instructions, and the case, it seems to us, is free from error.

The judgment is therefore affirmed.

MOUNT, CROW, ROOT, and RUDKIN, JJ., concur.

HADLEY, C. J. and FULLERTON, J., took no part.

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Citations of Counsel.

[No. 7341. Decided June 15, 1908.]

THE STATE OF WASHINGTON, *on the Relation of M. L. Potter et al., Respondents, v. KING COUNTY et al., Appellants, JOHN H. POWELL et al., Intervenors.*¹

STATUTES — TITLES AND SUBJECTS — SUFFICIENCY — RETROACTIVE LAWS. The title to Laws 1907, p. 348, "an act relating to the power of counties of the first class to construct or aid in the construction of canals," is not broad enough to include the provisions of section 3, validating prior acts of counties in that behalf under a prior invalid law; the constitutional requirement that no bill shall embrace more than one subject and that expressed in the title applying especially to enactments of a retroactive character.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 7, 1907, in favor of the plaintiff and interveners upon sustaining demurrers to the answer, in an action brought by taxpayers of a county to enjoin the issuance of bonds in aid of public improvements. Affirmed.

Kenneth Mackintosh and E. B. Herald, for appellant King County et al.

Roger S. Greene and H. A. P. Myers, for appellant Lake Washington Canal Association, as illustrative of the extent to which the court will go in sustaining a statute against the constitutional objection urged, cited: Clarke County v. Brazee, 1 Wash. Ter. 199; Van Houten v. Routhe, 1 Wash. 306, 25 Pac. 728; In re Rafferty, 1 Wash. 382, 25 Pac. 465; Yesler v. Seattle, 1 Wash. 308, 25 Pac. 1014; Baker v. Seattle, 2 Wash. 576, 27 Pac. 462; Bettman v. Cowley, 19 Wash. 207, 58 Pac. 53, 40 L. R. A. 815; Merritt v. Corey, 22 Wash. 444, 61 Pac. 171; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; State ex rel. Seattle Elec. Co. v. Superior Court, 28 Wash. 317, 86 Pac. 957, 92 Am. St. 831; State v.

¹Reported in 96 Pac. 156.

Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893; *State ex rel. Zenner v. Graham*, 34 Wash. 81, 74 Pac. 1058; *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060; *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845; *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36; *Marston v. Humes*, 9 Wash. 267, 28 Pac. 520; *Goudy v. Meath*, 38 Wash. 126, 80 Pac. 295; *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462.

As illustrative of the power of the legislature to enact retroactive provisions of a curative nature, closely analogous to the act in question, they cited: *Nolan County v. State*, 83 Tex. 182, 17 S. W. 823; *Steele County v. Erskine*, 98 Fed. 215; *Schneck v. Jeffersonville*, 152 Ind. 204, 52 N. E. 212; *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612; *Anderson v. Township of Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; *Baltimore etc. R. Co. v. Nesbit*, 10 How. 395, 13 L. Ed. 469; *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625; *State ex rel. Traders' Nat. Bank v. Winter*, 15 Wash. 407, 46 Pac. 644; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. 781; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *Pullman v. Hungate*, 8 Wash. 519, 36 Pac. 483; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306. Article 1, § 23, of the Constitution of Washington, prohibiting *ex post facto* laws, refers to criminal cases only. *Carpenter v. Commonwealth of Pennsylvania*, 17 How. 456, 15 L. Ed. 127; *League v. Texas*, 184 U. S. 156, 22 Sup. Ct. 475, 46 L. Ed. 478; *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761.

Shepard & Flett, John H. Powell and E. F. Blaine, for respondents, contended, *inter alia*, that generally legislation

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is prospective unless the contrary clearly appears, and such an intent must be expressed in the title. *Lindsay v. United States Sav. & Loan Co.*, 120 Ala. 156, 24 South. 171, 42 L. R. A. 783; *Thomas v. Collins*, 58 Mich. 64, 24 N. W. 553; *Lockport v. Gaylor*, 61 Ill. 276; *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; 26 Am. & Eng. Ency. Law (2d ed.), 591; *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035.

DUNBAR, J.—A detailed statement of this case can be found in 45 Wash. 519, 88 Pac. 935, where it was held that a county has no power to issue its negotiable bonds in aid of the acquisition by the United States of a completed ship canal in said county, payable to the contractor upon completion of the canal and its acceptance by the government. The case was brought by taxpayers seeking to enjoin the issuance of such bonds. A demurrer to the complaint was sustained by the lower court. Judgment of dismissal was entered. From such judgment appeal was taken, and the judgment was reversed. The respondent in that case then sought to have the necessary power conferred by express statutory provision, and the legislature of 1907 enacted the following (page 348, Laws of 1907):

“Section 1. That whenever the board of county commissioners of any county of the first class in this state shall deem it for the interest of the county to construct or to aid the United States in constructing a canal to connect any bodies of water within the county, such county is hereby authorized to construct such canal or to aid the United States in constructing the same and to incur indebtedness for such purpose to an amount not exceeding five hundred thousand (\$500,000) dollars and to issue the negotiable bonds of the county therefor in the manner and form provided in sections 1846 to 1851, inclusive, of Ballinger’s Annotated Codes and Statutes of Washington.

“Sec. 2. That such purpose is hereby declared to be a county purpose.

"Sec. 3. That in all cases where within one year next prior to the passage of this act any county has undertaken or attempted, or is undertaking or attempting to construct or to aid the United States in constructing any such canal or within said time has been or is incurring or attempting to incur indebtedness or to issue its bonds in manner and form above mentioned, for any such purpose to an amount not exceeding five hundred thousand (\$500,000.00) dollars, all such action by such county and all such indebtedness and bonds are hereby validated and confirmed and such county is authorized to proceed with the matter under the provisions of this act."

The title of the act was as follows: "An act relating to the power of counties of the first class to construct or aid in the construction of canals, and declaring an emergency." After the passage of the act aforesaid, the defendants, the appellants here, filed an answer in the lower court, setting up that statute by way of affirmative defense. To this affirmative defense the plaintiffs and interveners demurred. These demurrers were sustained, and electing to stand on their answers, judgment was entered against them, and from such judgment this appeal is prosecuted.

It is the contention of the respondents, (1) that the act of the legislature above quoted was ineffectual to cure the lack of statutory authority for the issuance of the bonds; (2) that the issuance of the bonds would be contrary to the constitution; (3) that they were not issued in conformity with the provisions of the statute. Under the former ruling of this court above referred to, it is the established law of this case that the county commissioners have no authority to issue these bonds unless the act of 1907 has validated the previous action of the county commissioners and the election held under their direction.

The first contention of the respondents is that the provisions of § 3 of the act, being the portion of the act which attempts to validate the action of the county commissioners

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and the people, are unconstitutional for the reason that such validating features of the act are not expressed in the title. In the discussion of this question the appellants in their opening brief cite many cases from this court illustrating the extent to which the court has gone in sustaining laws against this constitutional objection. It is true that we have been loath, as courts generally are, to declare the enactments of the legislature void by reason of this or any other constitutional objection, and have uniformly held, that trivial errors in describing the title of the act amended would not vitiate the title of the amending act where it was obvious that there was no tendency to mislead; that the constitutional provision should be reasonably construed and legislation sustained which fairly comes within the subject-matter embraced in the title.

But while this is true, the constitutional provision, § 19, art. 2, which provides that no bill shall embrace more than one subject and that shall be expressed in the title, was incorporated in the constitution for a beneficial purpose, viz., for the protection and enlightenment of the members of the legislature and for notice to citizens at large of proposed legislation which they might desire by proper methods to encourage or defeat; and when laws are enacted or amended in substantial violation of this guaranty, the taint of at least suspicion of unfairness is upon them, and courts should not hesitate to declare them void. Especially is this true when the enactment is of a retroactive character which is not ordinarily anticipated, for, as was said by the court in *Lindsay v. United States Sav. & Loan Co.*, 120 Ala. 156, 24 South. 171, 176, 42 L. R. A. 783: "The future, and not the past, is the ordinary, usual field and scope of legislation;" quoting one of Broom's Legal Maxims, that a legislative enactment ought to be prospective, not retroactive, in its operation.

" . . . retrospective laws, looking backward, are exceptions. Wade, Retroactive Laws, § 1. Because the future, not the past, is the usual field and scope of operation, comes the

general rule that, by construction, retroactive or retrospective operation will not be given a statute, unless its terms show clearly the legislative intention that it should have such operation. Cooley, Const. Lim. 455."

If that be true of the act itself, then for the same reason it must be equally true that the title of the act should direct the mind to the retrospective character of the enactment. But the citation of authorities is unnecessary in this case, for this court has decided the exact question in issue in *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035. The appellants in their reply brief undertake to distinguish this case, but we are satisfied from an examination of the case that it cannot be distinguished in any essential particular. There we decided that the title of the act, showing that its object is to provide for the organization and government of irrigation districts and the sale of bonds arising therefrom, is not broad enough to embrace a provision in the act for validating the indebtedness of a district previously organized and the levying of a tax to pay the same. The title of the act in question was: "An act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, and declaring an emergency."

"Hence, the question presented for decision," said the court in that case, "is as to whether or not a title which shows nothing more than that the act is to provide for the organization and government of irrigation districts and the sale of bonds arising therefrom is broad enough to warrant the enactment thereunder of a provision for the validating of the indebtedness of a district which might have been organized thereunder, and the levying of a tax to pay the same;" and it was held that it was not. It was said by the court in the course of the argument:

"Would one reading the title of the act which simply provided for the organization of irrigation districts have his mind at all directed to the question of validating an indebtedness which such district had in the past sought to incur? It

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seems to us not. A provision for the incurring of an indebtedness in the future might be reasonably expected to be found among the provisions for the organization of such districts; but the validation of past indebtedness, or the fact that such past indebtedness existed, would have no reasonable or natural connection with the organization of such districts."

The same language might aptly be applied to the title of the act in this case, an act relating to the power of counties of the first class to construct or aid in the construction of canals, and declaring an emergency. The legislation which would naturally be expected under a title of this kind is found in § 1 of the act, but as was said by the court in the above quoted case, one reading the title of the act, which simply related to the powers of counties to construct or aid in the construction of canals, would not have his mind at all directed to the question of validating the previous actions of the county commissioners.

The conclusion we have reached on this subject renders an expression of opinion unnecessary on the other questions raised in the briefs. But for the reasons above expressed, the judgment is affirmed.

MOUNT, CROW, and RUDKIN, JJ., concur.

HADLEY, C. J. and FULLERTON, J., took no part.

[No. 7424. Decided June 16, 1908.]

JOHN OLSON, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.¹

CARRIERS — PASSENGERS — TICKETS — RELIANCE UPON — WRONGFUL EJECTION—MISTAKE. A passenger has a right to rely on transportation sold to him by the proper agent, without reading or examining the same, and if ejected from the train through the mistake of the agent without negligence on his part, he may recover therefor. ²

SAME—NEGLIGENCE IN PURCHASING TICKET—EVIDENCE—QUESTION FOR JURY. Whether a passenger was guilty of negligence in purchasing a ticket is for the jury, where it appears that he was notified that he must obtain a permit of the agent to travel by freight train, that he applied therefor to the agent, signed for it, paid his fare, and he testified that he received only a permit, which he supposed was a ticket and tendered as such, and he was corroborated by one witness to the point that no ticket was issued, although there was evidence to the contrary, and that he left his ticket at the window of the office.

SAME—EJECTION—EXCESSIVE DAMAGES. A verdict for \$800 for the wrongful ejection of a passenger from a freight train, is so excessive as to show that it was the result of passion or prejudice, requiring a new trial, where the plaintiff was a man of mature years, there was no financial loss or injury to the person, and only two or three other passengers on the train, to whom it was apparent that there had been merely a mistake of some kind as to the ticket not reflecting on the plaintiff.

APPEAL—REVIEW—EXCESSIVE VERDICTS—PASSION OR PREJUDICE—DECISION—NEW TRIAL. Where a verdict is clearly excessive and out of all reason, and the result of passion or prejudice, and the right of recovery is doubtful, the verdict should not be merely reduced and allowed to stand in any of its findings, but a new trial should be ordered.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered August 1, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for ejecting a passenger from a railway train. Reversed.

¹Reported in 96 Pac. 150.

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B. S. Grosscup and *A. G. Avery*, for appellant, contended, *inter alia*, that there was no duty to carry by freight trains. *Illinois Cent. R. Co. v. Nelson*, 59 Ill. 110; *Falkner v. Ohio & Mississippi R. Co.*, 55 Ind. 369. Carriers may fix regulations for so doing. 2 Rorer, Railroads, p. 985; Moore, Carriers, pp. 624, 746; 5 Am. & Eng. Ency. Law, p. 540. The regulation was a reasonable one. 5 Am. & Eng. Ency. Law, p. 606; *Falkner v. Ohio & Mississippi R. Co.*, *supra*; *Thomas v. Chicago and Grand Trunk R. Co.*, 37 Am. & Eng. R. R. Cases 108. The passenger is bound to take notice of such regulations. *Johnson v. Concord R. Co.*, 46 N. H. 213, 88 Am. Dec. 199; *McRea v. Wilmington etc. R. Co.*, 88 N. C. 526, 43 Am. Rep. 745; 5 Am. & Eng. Ency. Law (2d ed.), p. 484. He is presumed to read the conditions of his ticket, and to have assented. 6 Cyc. 540; 28 Am. & Eng. Ency. Law (2d ed.), p. 170. A case in point is, *Ellis v. Houston etc. R. Co.*, 30 Tex. Civ. App. 172, 70 S. W. 114. A passenger cannot recover for being misinformed, where he had knowledge of the regulations. *Connell v. Mobile & O. R. Co.* (Miss.), 7 South. 344. His good faith, and his ignorance of the regulation, do not avail him where suitable notice has been given by posting in a conspicuous place in a waiting room. *B. & M. R. Co. v. Rose*, 11 Neb. 177, 8 N. W. 433; *McCook v. Northup*, 65 Ark. 225, 45 S. W. 547. The verdict was excessive. *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Cunningham v. Seattle Elec. Co.*, 3 Wash. 471, 28 Pac. 745; *Shannon v. Northern Pac. R. Co.*, 44 Wash. 321, 87 Pac. 351.

Troy & Falknor, for respondent.

RUDKIN, J.—The defendant owns and operates a line of railroad between Centralia and South Bend, in this state, and is a common carrier of passengers and freight for hire. It is not, however, a common carrier of passengers by freight trains, and does not hold itself out as such. On the contrary,

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in order to take passage by freight, the intending passenger must first purchase a ticket and procure a permit from the proper agent of the company, and freight conductors are forbidden to receive or carry passengers without such permit. Notice of this regulation is posted in all depots along the line of the road, and two such notices were posted in the depot at Dryad at the time hereinafter mentioned. On the 24th day of August, 1906, the plaintiff applied to the defendant for transportation by freight train from Dryad to Meskill, in Lewis county, a distance of about four miles, and was informed by the conductor that he must or should obtain a permit from the agent at Dryad. The testimony is conflicting as to what transpired between the plaintiff and the agent at the time the permit was applied for. The agent testified that the plaintiff applied to him for transportation by freight from Dryad to Meskill, that he took a ticket from the case, wrote out the permit from the ticket, turned the book containing the blank permits around to the plaintiff for his signature, gave the plaintiff his change, and shoved the permit and ticket toward him; that, in the course of a half hour or so, the plaintiff returned to the depot, claiming that he had been ejected from the train because the witness had failed to give him a ticket; that the witness then looked for the ticket and found it in the ticket office window where the plaintiff had left it; that the witness then cancelled the ticket and refunded the plaintiff his money. The agent was corroborated in a measure by the fact that the permit described the ticket by number, and could not have been made out without reference to it. The ticket and permit, however, were left in possession of the agent and were produced by the defendant at the trial. The plaintiff, on the other hand, testified that no ticket was issued to him, that he paid his fare, and the agent gave him the permit in return, that he supposed the permit was the proper evidence of his right to transportation, and that he entered the caboose for that purpose. He denied that the

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ticket was found on his return to the depot as stated by the agent. To the point that no ticket was issued, the plaintiff was corroborated by one other witness. At or about the time the train started, the conductor came around to take up fares. The plaintiff presented his permit, but was informed that he must produce a ticket or pay his fare, amounting to fifteen cents. The plaintiff explained that he had paid his fare to the agent and refused to pay again. The train was thereupon brought to a stop and the plaintiff ejected therefrom. This action was instituted to recover damages for the wrongful expulsion, and from a judgment in favor of the plaintiff for \$800, this appeal is prosecuted.

We agree with the appellant that its regulations for the transportation of passengers by freight trains are reasonable and valid, and that passengers desiring to travel in that way must comply with such regulations. But an intending passenger who applies to the proper agent of the company for transportation by freight train has the same right to rely on the transportation furnished him as has any other passenger, and if he relies on the transportation furnished and is ejected from the train because of a mistake of the agent and without fault or negligence on his own part, he has a right of action. While there is some conflict in the authorities bearing on this question, the better rule is that a passenger has a right to rely on the ticket agent, and is not bound, as a matter of law, to read or examine his transportation before taking the train. It is for the jury to say whether the passenger is guilty of negligence in not discovering the mistake of the agent before taking the train, and the mere failure to examine or read his ticket or contract of carriage is not conclusive on that question. *Northern Pac. R. Co. v. Pauson*, 70 Fed. 585; *New York etc. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Louisville & Nashville R. Co. v. Gaines*, 99 Ky. 411, 36 S. W. 174, 59 Am. St. 465; *Pittsburgh etc. R. Co. v. Reynolds*, 55 Ohio

St. 370, 45 N. E. 712, 60 Am. St. 706; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. 913; *Gulf etc. R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951; 6 Cyc. 557; 5 Am. & Eng. Ency. Law (2d ed.), p. 603. And in this case, if the jury should find that the respondent paid his fare to the agent, and took the permit issued to him, believing in good faith that it was the evidence of his right to transportation, that he was ejected from the train by reason of the mistake of the agent in failing to give him a ticket, and that the respondent was not at fault in failing to discover the mistake before entering the car, a right of recovery was shown. There was testimony to warrant such a finding, and the motion for a nonsuit and for a directed judgment were properly denied.

The only other assignment we deem it necessary to consider is the claim that excessive damages were allowed under the influence of passion or prejudice. The verdict in this case is out of all reason. There was no financial loss, there was no injury to the person, there was a naked violation of a technical legal right which would entitle the respondent to little more than nominal damages. He was a man of mature years, there were but two or three other passengers on the train, and if they saw what transpired it could in no manner reflect on the respondent, as a mistake of some kind was apparent. The claim of the respondent that he was or might be taken for a hobo stealing a fifteen-cent ride, with his compass, maps and grip, is fanciful to say the least. Mistakes will occur to the most careful and the most competent, and if every mistake in the business world were to be followed by such consequences as this the transaction of ordinary business would become exceedingly hazardous. Had a like mistake occurred between private individuals, followed by the same degree of inconvenience and annoyance, a jury would grudgingly allow nominal damages, if they suffered a recovery at all. The fact that the appellant is a railroad com-

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pany should not weigh with the jury and does not weigh with this court. In *Davis v. Tacoma R. & Power Co.*, 95 Wash. 203, 77 Pac. 209, 66 L. R. A. 802, the wrongs suffered by the plaintiff were greater than those disclosed by the record before us, yet this court set aside a verdict of \$750, saying that the evidence showed little more than a bare violation of a technical legal right which caused a momentary annoyance to the plaintiff. In *Cunningham v. Seattle Elec. R. Co.*, 9 Wash. 471, 28 Pac. 745, and *Shannon v. Northern Pac. R. Co.*, 44 Wash. 321, 87 Pac. 351, the recoveries were reduced to \$500, and the wrong and humiliation to which the plaintiff in each case was subjected were incomparably greater than in this case.

We might follow our usual practice and reduce the judgment to such sum as the respondent is entitled to recover in our view of the facts, and require him to accept that amount or submit to a new trial, but the right of recovery is doubtful at best, and the verdict discloses such passion and prejudice on the part of the jury that it would be unjust to hold a litigant foreclosed by any of the findings. The judgment is therefore reversed and the cause remanded for a new trial.

HADLEY, C. J., FULLERTON, CROW, MOUNT, DUNBAR, and ROOT, JJ., concur.

[No. 7378. Decided June 17, 1908.]

**AMERICAN BONDING COMPANY OF BALTIMORE, Respondent, v.
ABEL H. DUFUR *et al.*, Appellants.¹**

JUDGES—QUALIFICATIONS—RESIDENCE—COURTS — JURISDICTION. It is not a valid objection to the jurisdiction of the superior court that the judge was not a resident of the county, the constitution not requiring a local judge in each county.

INDEMNITY—CONTRACT—ACTIONS—PLEADING — ANSWER — SUFFICIENCY. An answer in an action upon a contract to indemnify a surety company from liability on a forthcoming bond given for the defendants, is insufficient where there was no denial of the execution of the bond, or of the recovery of the judgment thereon against the plaintiff, or of the payment of the judgment, or of notice to the defendants to appear and defend the action on the bond, or any allegation of fraud, payment or other defense.

JUDGMENT—BY DEFAULT—TRIAL. Where defendants were in default, and the court ordered judgment of default unless an answer should be filed showing a meritorious defense, and answers were filed showing no defense, the answers may be stricken and judgment of default entered.

INDEMNITY—CONTRACTS OF—ACTIONS—DEFENSES — COMPENSATION FOR EXECUTING BOND. It is no defense to an action to indemnify a surety company on a contract from liability on a forthcoming bond, that the defendants had compensated the surety company by payment of \$15 as consideration for executing the bond, where defendants had especially contracted with the surety company to hold it harmless from damages of any kind.

SAME—CONTRACTS OF—ATTORNEY'S FEES AS DAMAGES. In an action on a contract to indemnify a surety company from liability on a bond given, an attorney's fee for prosecuting the action may be allowed as part of the damages, where the contract provides for the payment of such an attorney's fee.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered December 2, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a liability incurred under a surety bond. Affirmed.

¹Reported in 96 Pac. 160.

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Opinion Per DUNBAR, J.

*John F. Dufur and E. B. Dufur, for appellants.**Blattner & Chester, for respondent.*

DUNBAR, J.—The complaint in this case stated, in substance, that the plaintiff was a corporation entitled to transact business in this country, etc., and empowered to become surety upon judicial bonds; that on the 19th day of September, 1904, it had become surety upon a forthcoming bond in an action then pending in the superior court of the state of Washington, wherein one Timothy L. Driscoll was plaintiff and the appellants herein appeared as defendants; that the said Driscoll obtained judgment in said action; that thereafter the said Driscoll sued the plaintiff upon said bond; that plaintiff appeared in the action, defended the same, and that Driscoll recovered judgment of the plaintiff in the sum of \$842.25, and his costs and disbursements taxed in the sum of \$29.90, being \$872.15; that thereafter plaintiff paid and satisfied said judgment in full in the sum of \$872.15; that in the defense of said cause the plaintiff incurred in all, expenses amounting to \$171.35, the expenses being itemized in the complaint; that the plaintiff notified the defendants that suit had been instituted, and requested the defendants to appear and defend the same; again notified the defendants that the said cause had been set for trial for September 24, 1907, and again requested them to appear and defend the cause; but that said defendants did not appear or offer to defend the same; that the plaintiff defended said cause at its own cost and expense; that a reasonable attorney's fee for the prosecution of this case is \$125; and asked for judgment in the sum of \$1,127.26, and for costs taxed at \$17.20. On November 7, 1907, defendant John Dufur filed an objection to the jurisdiction of the court, and the hearing was noted for November 11, and was on that day overruled. The other defendants not appearing, plaintiff moved for judgment by default. Motion was not granted, and the defendants were

allowed five days' time from that date in which to file an answer.

On the 12th day of November, defendants filed another objection to the jurisdiction of the court, based on affidavits. The plaintiff thereupon moved to strike said affidavits and objection, for the reason that they were sham, frivolous, and irrelevant, and further moved for judgment for default; and said motions for default and to strike the affidavits were set for hearing on the 25th day of November. On that day the motions were called for hearing and were stricken by the court on the ground that they were sham, frivolous, and irrelevant, and did not constitute pleadings, and were not in compliance with the order of the court theretofore made. The court further ordered that said defendants were in default, and that judgment of default would be rendered against them unless they should file and serve upon plaintiff's attorneys an answer to the complaint, which answer should disclose a meritorious defense. Thereafter defendants each filed separate demurrers to the complaint, which demurrers were afterwards overruled, answers were filed, and motion was made to strike the answers for the reason that they did not disclose a meritorious defense, which said motion was granted. The case was then continued until the 2d day of December, 1907, for the purpose of taking proof as to the amount of damages sustained by plaintiff. Thereafter, on the 2d day of December, 1907, the cause came on for trial, and the defendants appeared by their respective attorneys, and the court made its findings of fact and conclusions of law and entered judgment for the plaintiff in the sum of \$1,127.26, and costs taxed at \$17.20. From that judgment, this appeal is taken.

Appellants' brief is so rambling, vituperative, and discourteous to the trial court that, had there been a motion to strike it, the motion would probably have been sustained, as a brief of this kind has no place in the records of this court

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and is no aid to the court in determining legal questions involved in a lawsuit. But as no motion has been made to strike the brief and affirm the judgment, we have undertaken to discover what the merits of the controversy are.

The first error assigned is that the court erred in overruling the objection to the jurisdiction. This motion was based upon the claim that, under the constitution, each county in the state was entitled to a judge, and that Honorable W. W. McCredie who tried the case was a resident of Clarke county, and not of Cowlitz county where the cause was tried. There is no merit in this contention. *State ex rel. Dustin v. Rusk*, 15 Wash. 403, 46 Pac. 387.

The demurrers were properly sustained. The answers are too long to set up here, but they constituted no defense whatever to the complaint. This was a simple action on a liability incurred under a bond given by respondent to the appellants, and under a special provision in the bond that the applicants, appellants here, would at all times indemnify and keep indemnified and save harmless the said company from and against all loss, liability, costs, damages, charges, counsel fees, and expenses whatsoever which said company should or might for any cause at any time sustain, incur, or be put to, for or by reason or in consequence of said company having executed said bond. There is no denial of the execution of the bond, or of the recovery of the judgment against the respondent, or the payment thereof; nor is there any denial that the appellants were notified to appear and defend against said action. It is difficult to comprehend what answer there could be to an action of this kind in the absence of a denial of the execution of the bond, or the rendering of the judgment against the respondent, or an allegation of collusion or fraud, or an allegation of the payment of the judgment.

The third assignment is that the court erred in ordering a default, but the appellants were so plainly in default and

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acted so directly in opposition to the orders of the court that this assignment is not discussable.

It is the contention of the appellants that they were under no obligation to answer for the judgment against respondent, for the reason that they paid it \$15 as compensation for its executing a bond in their favor, or rather for appearing as surety upon their bond. A sufficient answer to this contention is that they especially contracted in their agreement with the bonding company to hold it harmless for damages of any kind.

It is also earnestly urged that in any event no attorney's fees should have been allowed in this case, but the same contract provides for the payment by the appellants of attorney's fees; and the appellants agreed that the court in this case should fix the amount of attorney's fees, provided it was proper for any attorney's fees to be allowed, and it was proper under the conditions of the agreement.

We do not feel called upon to answer the appellants' aspersions upon the action of the trial court. A perusal of the record satisfies us that the court acted well within its discretion, and that the appellants were not deprived of any rights which they were entitled to under the law.

The judgment is therefore affirmed.

HADLEY, C. J., CROW, MOUNT, ROOT, FULLERTON, and RUDKIN, JJ., concur.

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Statement of Case.

[No. 7330. Decided June 17, 1908.]

EXPOSITION AMUSEMENT COMPANY, Respondent, v. EMPIRE STATE SURETY COMPANY, Appellant.¹

MECHANICS' LIENS—INDEMNITY AGAINST CLAIMS—CONTRACT—CONSTRUCTION—CLAIMS ALLOWED. In an action upon an agreement by a surety company to hold the owner of a building free from any claims for materials furnished or used in the building, the plaintiff may show the claims for materials furnished and used of parties joined as defendants, although they did not appear in the action.

SAME. In such an action, it is error to allow the plaintiff to recover for a defective roof that did not comply with the contract, placed by a subcontractor, and to allow a lien to the contractor therefor, where the architect properly rejected the same and a new roof was put on and the cost thereof charged against the defendant; and it would be immaterial that the contractor consented to allow charges for the two roofs, after the work was taken from him.

CORPORATIONS—ACTIONS—LICENSE FEES—STATUTES—RETROACTIVE EFFECT. Laws 1907, p. 271, requiring that the payment of an annual license fee by a corporation be alleged and proved in order to maintain an action in the courts of this state, is not retroactive, and does not affect actions previously commenced.

MECHANICS' LIENS—INDEMNITY AGAINST CLAIMS—CONTRACTS—CONSTRUCTION. Where a surety company undertakes to complete a building after the contractor's default, and in consideration of the waiver of accrued stipulated damages for delay, "waives any and all objections it may have," and agrees to immediately complete the building, it cannot object to departures in the performance of the original contract during the performance of the work by the contractor.

SAME—DEFENSES—SETTLEMENT. It is no defense to an action upon a contract to indemnify against all claims, entered into by a surety completing a building, that a settlement made between the owner, architect and defaulting contractor was made without notice to the surety, when the surety was not held bound by the settlement and was allowed to contest the same.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 31, 1907, upon find-

¹Reported in 96 Pac. 158.

ings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed in part and affirmed in part.

*John P. Hartman and E. R. York, for appellant.
Williamson & Williamson, for respondent.*

MOUNT, J.—Respondent brought this action to enforce the liability of the appellant upon a contract hereinafter set out. Upon a trial, judgment was entered against the Empire State Surety Company, which prosecutes this appeal.

The facts as disclosed at the trial are, in substance, as follows: About November 3, 1906, the Exposition Amusement Company, a corporation, entered into a contract with the defendant L. H. Williams, by which the latter agreed to furnish the materials and construct a building in the city of Tacoma, for the sum of \$8,600, according to certain plans and specifications. This contract was the usual builder's contract, and specified, among other things, that the building should be completed within two months from November 3, 1906, and provided for a payment by the contractor of \$50 per day for each day in excess of two months, until the building was completed. The appellant executed and delivered to respondent a bond in the sum of \$8,600, conditioned for the faithful performance of the contract by said Williams, which contract, with the plans and specifications, was made a part of the bond. The completion of the building was delayed beyond the time of two months, and while the contractor was in default, the Exposition Amusement Company and the appellant entered into a contract as follows:

"AGREEMENT."

"This agreement, made and entered into this 4th day of February, A. D. 1907, by and between the Empire State Surety Company of New York, party of the first part, and the Exposition Amusement Company, a corporation in the state of Washington, party of the second part,

"Witnesseth: That whereas that certain contract bond dated the 6th day of November, A. D. 1906, wherein L. H.

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Williams & Co. is the principal and the Empire State Surety Company, the first party hereto, is the surety, and the Exposition Amusement Co., the second party hereto, is the obligee, provides for a penalty of \$50 per day, to be paid to the said the Exposition Amusement Company, the obligee therein named, for each and every day until the completion of the building provided for and referred to in said bond and contract thereto attached after the time limit fixed in said bond, to-wit: Two months from the third day of November, 1906, and

"Whereas, twenty-five days have elapsed since the time limit for the completion of said building has expired and the same still remains unfinished and there has accrued at this date under said bond and contract a penalty of \$50 per day for twenty-five days, making a total of \$1,250.

"Now, therefore, in consideration of said second party waiving said accrued penalty, the said first party hereby waives any and all objections it may have and agrees to immediately carry out all of its obligations under said bond by paying any and all claims against said second party, the Exposition Amusement Company, on account of said building over and above the sum of \$8,600, less claims for extras, if any, due L. H. Williams & Co., contractors, the contract price to be paid by said second party to the contractors, the said L. H. Williams & Co., for the construction of said building, and to hold said second party absolutely free from any claim or claims for materials or liens for labor or materials used in connection with or upon said building, and from any law suits begun or that may hereafter be begun for or on account of any labor performed upon or for materials furnished and used in connection with the construction of said building provided for in said bond and contract. It is understood that this writing shall not increase the obligations and liabilities other than imposed by the original bond.

"Dated this 4th day of February, A. D. 1907.

"The Empire State Surety Company,

"By Eugene Church, Its Attorney in Fact.

"The Exposition Amusement Company,

"By D. F. Lampman, Its Vice President.

"Witness: Geo. G. Williamson."

About the time this last-named agreement was entered into, or shortly prior thereto, the surety company took charge of the work and thereafter finished the building and delivered possession of the same to the respondent, the Amusement Company. There is some dispute as to whether the appellant took charge of the work, but the court found that it did, and, we think, correctly upon the evidence. On March 11, 1907, the Amusement Company and Williams, the contractor, and the architect in charge of the work, agreed that extras had been placed in the building to the amount of \$232.94, making the total amount of the contract, less a small deduction, \$8,829.94. They also found and agreed, that the Amusement Company had paid thereon \$8,049.16; that there was a balance due on the contract amounting to \$780.78. It was also found that there were a large number of unpaid labor and material claims, amounting to \$5,311.95. The Amusement Company thereupon paid certain of these claims, amounting to \$636.22, leaving a balance of \$144.56 due on the contract price of the building. Subsequently certain labor and material claimants filed liens on the building, and were proceeding to foreclose the same when this action was begun by the Amusement Company to require the surety company to pay the amount of these claims. All the lien claimants were made parties defendant. Upon the trial a judgment was entered against the surety company for the sum of \$5,682.70, less \$144.56 due on the contract. Other facts necessary to an understanding of the points raised will be stated in connection therewith.

It is first contended by the appellant that the trial court erred in refusing evidence in support of the claims of the J. L. Todd Lumber Company and the Tacoma Trading Company. These claimants were made parties defendant, but did not appear by answer. They were called as witnesses, and permitted to testify that they had furnished materials which were used in the building, and had not been paid there-

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for. The contract entered into on the 4th day of February, 1907, and upon which this action is based, provides that the appellant shall hold the respondent free from any claim or claims for materials furnished and used in the building. We think under this contract, that the respondent was at liberty to show the amount of such claims, and that they were enforceable whether the parties appeared in the action or not.

Appellant next argues that the trial court erred in allowing claims for two roofs placed on the building. It appears that the Raeco Products Company agreed to furnish certain materials and place a roof on the building for the sum of \$350, guaranteeing the roof against defects of material and workmanship for a period of five years. This roof was completed about January 18, 1907. Thereupon it leaked badly. Complaints were made by the owner and architect, and thereupon the Raeco Company attempted to repair it, but did not succeed. Thereafter on February 18, 1907, after repeated notices to the Raeco Company to repair the roof, and failure on its part to do so, the architect in charge ordered the men employed by the Raeco Company from the building, and a new roof was put on at an expense of \$606. The Raeco Company thereupon presented a bill for \$359.08, \$9.08 being for materials used in attempting to repair the roof. This bill was rejected, and a lien was then filed and suit brought by the Raeco Company to foreclose the lien. The present action was afterwards brought, and the Raeco Company was made a party and appeared, and the question of the right of the Raeco Company to recover was tried out in this case. The court found that the Raeco Company was entitled to foreclose this lien for the sum of \$359.08 and costs and attorney's fees, amounting altogether to \$465.45.

It is argued that the cost of both these roofs cannot justly be charged against the appellant. This contention must be sustained. The evidence convinces us that the roof placed on the building by the Raeco Company was insufficient, was

of no value, and was not a substantial performance of its contract. The roof leaked from the beginning, and for a month thereafter, and it was in substance conceded that it was not a proper roof for the building. We are satisfied from a careful reading of the evidence that the architect was justified in rejecting the work and ordering the workmen of the Racco Company from the roof after they had a month in the rainy season when the leaks were damaging the building and had failed to make the roof turn water. The roof which was afterwards put upon the building was placed there at the instance of the architect in charge for the appellant company, and, as a matter of course, was a valid claim against the appellant under the contract. The fact that the contractor afterwards agreed that both items should be allowed cannot be considered, because the appellant was then in charge of the work and was not bound by admissions of the contractor who had practically surrendered the work to the surety company for completion. When the contractor was in charge, the claim was rejected by the architect. This item of \$465.45 should therefore have been rejected and the Racco Company dismissed.

It is next claimed that the complaint should have been dismissed for the reason that the plaintiff is a corporation and it was not alleged or proven that it had paid its annual license fee under the provisions of the Laws of 1907, page 271. This action was begun before that act took effect. The act is not retroactive.

It is next claimed that the trial court erred in excluding evidence relating to departures from the requirements of the original contract during the performance of the work, and that settlements were made without notice. A complete answer to all these contentions is that the appellant, by the contract of February 4, set out above, expressly "waives any and all objections it may have and agrees to immediately carry out all of its obligations under said bond by paying

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any and all claims against said second party, the Exposition Amusement Company." Thereafter it assumed to complete the building, and placed the same in charge of Mr. Long, the architect, who did complete it. Even if the final settlement which was had between the Amusement Company, Mr. Williams, the contractor, and the architect, was without notice to the appellant, as is contended, the result would be that the appellant was not bound thereby and might in this suit contest the same, which was done.

We are of the opinion that all the claims allowed, together with the attorney's fees, were properly allowed, with the exception of the claim of the Raeco Company above considered. As to that claim the judgment is reversed. In all other respects the judgment is affirmed, with costs in favor of the appellant.

HADLEY, C. J., CROW, DUNBAR, ROOT, FULLERTON, and RUDKIN, JJ., concur.

ON PETITION FOR REHEARING.

[Decided September 26, 1908.]

PER CURIAM.—The Raeco Products Company has filed a petition for a rehearing in this case. The decision does not affect the right of the Raeco Company to recover the amount of its lien against the Exposition Amusement Company. The lien of the Raeco Company was established both against the Amusement Company and the appellant. The Amusement Company did not appeal, and the judgment became final as to it. The decision reversing the judgment against the appellant did not, therefore, affect the right of the Raeco Company against the Amusement Company. We do not desire to change our conclusion so far as it affects the appellant. The petition for rehearing is therefore denied.

[No. 7328. Decided June 22, 1908.]

WILLIAM DALE, Appellant, v. J. B. DURYEA, Respondent.¹

USURY—CONTRACTS—CONSTRUCTION—REPAYING ADVANCEMENT. A contract is usurious on its face, where it recites that plaintiff advanced to the defendant \$287.50 for a cash payment on stock purchased by defendant, and agreed to assume defendant's note for \$200, in consideration of which the defendant agreed to sell the stock and repay the plaintiff \$650 within six months; and it is immaterial that plaintiff claims it was an agreement to divide the profits on the stock, when in fact the stock became worthless and was not sold.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered November 29, 1907, upon findings in favor of the defendant, dismissing an action on contract, after a trial before the court without a jury. Affirmed.

W. G. Heinly (Charles Bedford, of counsel), for appellant.
Ellis, Fletcher & Evans, for respondent.

MOUNT, J.—This action was brought by the appellant to recover a balance of \$570.70, alleged to be due upon the following contract:

“Tacoma, Washington, May 5, 1904.

“I, J. B. Duryea, having purchased thirteen hundred shares of the capital stock of the West Coast Veneer & Manufacturing Company, of S. A. Easterday, for a consideration of two hundred eighty-seven and 50-100 dollars (\$287.50) cash, to be paid him this day, and the assumption by me of one certain note of two hundred dollars (\$200) given by said Easterday to William Dale, hereby give and bind myself unto said William Dale that, if he will hold said thirteen hundred shares of stock for me, and advance said cash payment of \$287.50 and will extend said note until October 1st, 1904, I will on or by that time find a purchaser for said stock and will pay to him the sum of six hundred and fifty dollars (\$650), and, upon such payment, he is to return to me the aforesaid thirteen hundred shares of stock.

“(Signed)

J. B. Duryea.”

¹Reported in 96 Pac. 223.

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Opinion Per MOUNT, J.

It was alleged that a payment of \$79.30 had been made upon the contract. The respondent admitted making the contract and the payment, but alleged that the same was usurious and that nothing was due thereon. At the trial the court found, "that the transaction was one of a loan, and that the agreement sued upon evidencing the transaction provided for a usurious rate of interest, and that the interest paid and accrued calculated at the rate specified in said agreement would, at the date of the bringing of the action, to wit, April 24, 1906, be equal to more than the loan;" and for that reason dismissed the action. The plaintiff appeals.

The contract appears usurious upon its face. The appellant loaned the respondent \$287.50, and agreed to substitute respondent on a note for \$200, for which the respondent agreed to repay \$650 within six months. This transaction was clearly usurious. The appellant's contention is that he furnished the money to respondent to buy the thirteen hundred shares of stock mentioned, and that the stock was to be sold by respondent and the profits divided between them. This, of course, is not the contract sued upon, and even if this contention were supported by the evidence, it is difficult to see how the appellant can claim more than the note assumed and money advanced to the respondent, because it is conceded that the stock was not sold but became worthless.

We are satisfied that the trial court correctly found the facts, and the judgment must therefore be affirmed.

HADLEY, C. J., ROOT, FULLERTON, RUDKIN, CROW, and DUNBAR, JJ., concur.

[No. 6948. Decided June 22, 1908.]

JACOB KIEHLHOFER, Respondent, v. WASHINGTON WATER POWER COMPANY, Appellant.¹

NEW TRIAL—GROUNDS—TRIAL—MISCONDUCT OF COUNSEL. A new trial is properly granted for permitting, over objection, adverse comment to the jury by counsel on the fact that the plaintiff in a personal injury case had refused to consent to the examination of his physician as to facts learned in a professional capacity.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered June 17, 1907, granting to plaintiff a new trial, after the verdict of a jury in his favor for one dollar, in an action for personal injuries. Affirmed.

H. M. Stephens, for appellant.

Robertson & Rosenhaupt, for respondent.

PER CURIAM.—The respondent sued the appellant for personal injuries received while riding upon a street car owned and operated by the appellant. The jury returned a verdict in his favor for one dollar, and, being dissatisfied therewith, he moved for a new trial on various grounds, among which was the ground that counsel for appellant had been permitted, over his objection, to comment adversely to the jury on the fact that he had refused to consent to the examination of one of his attending physicians as to facts learned by the physician while the physician was attending on him in a professional capacity. The court granted a new trial solely on the latter ground, overruling the motion as to all others. This appeal is from the order granting the new trial.

The new trial was properly granted. The statute which forbids a physician to testify without the consent of his patient concerning facts which he acquires while attending the patient in a professional capacity is founded upon prin-

¹Reported in 96 Pac. 220.

June 1908]

Opinion Per Curiam.

ciples of sound public policy, and a like policy requires that the enforcement of the rule on the part of the patient be not taken as a circumstance adverse to the patient. There are cases which maintain a contrary doctrine, but we think they are not in accord with the reason of the statute, nor with the spirit of our own decisions. See, *Noelle v. Hoquiam Lumber & Shingle Co.*, 47 Wash. 519, 92 Pac. 372; *State v. Smokalem*, 37 Wash. 91, 79 Pac. 608.

The order granting a new trial is affirmed.

[No. 7380. Decided June 22, 1908.]

**W. H. HEINZERLING, Respondent, v. JOHN B. AGEN,
Appellant.¹**

DEPOSITIONS—ADMISSION IN EVIDENCE—PRESUMPTION AS TO REASONS FOR TAKING. Under Bal. Code, § 6028, which provides that a deposition shall not be read in evidence if it appears at the trial that the reason for taking the same no longer exists, it will be presumed that the reason continues to exist until the contrary is shown by the adverse party, and the deposition is admissible without any showing.

APPEAL—DECISION—LAW OF CASE. The decision of the supreme court on a former appeal is conclusive of the questions considered.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 30, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Blaine, Tucker & Hyland and *James B. Kinne*, for appellant.

Gill, Hoyt & Frye, for respondent.

PER CURIAM.—This case was before this court on a former appeal where a full statement of the facts will be found. *Heinzerling v. Agen*, 46 Wash. 390, 90 Pac. 262. A retrial

¹Reported in 96 Pac. 223.

was had in the court below after the case was remanded, and from a judgment in favor of the plaintiff, the defendant has again appealed.

A deposition taken and used at the first trial was read at the second trial, over objection, without any showing that the reasons for taking the deposition still existed, and this ruling is assigned as error. Bal. Code, § 6028 (P. C. § 992), provides that depositions shall not be read in evidence if it appears at the trial that the reasons for taking them no longer exist, but this court has held that the reasons for taking the deposition will be presumed to continue and the burden is on the adverse party to show the contrary. *Hennessy v. Niagara Fire Ins. Co.*, 8 Wash. 91, 35 Pac. 585, 40 Am. St. 892. The remaining assignments are based on the denial of a motion for nonsuit, and on exceptions to instructions given, and the refusal to give instructions requested. The testimony was the same at both trials, and the objections urged against the denial of the motion for nonsuit and the charge of the court were fully considered on the former appeal, and decided adversely to the appellant. The instructions requested were embodied in the general charge of the court, in so far as they were proper or material, and finding no error in the record the judgment is affirmed.

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Opinion Per RUDKIN, J.

[No. 7133. Decided June 22, 1908.]

T. RYAN, *Respondent*, v. MAGNUS LAMBERT *et al.*,
*Appellants.*¹

PLEADING—ANSWER—ARGUMENTATIVE DENIAL. In an action of unlawful detainer, an answer that defendants were holding under a different lease from that alleged in the complaint is only an argumentative denial, and adds nothing to a general denial in the answer.

SAME—REPLY—INCONSISTENCY. A denial in a reply that defendants hold under a certain lease is not inconsistent with a denial of the validity of the lease.

TRIAL—NONSUIT—WAIVER OF OBJECTIONS—APPEAL—REVIEW. A motion for a nonsuit is waived by proceeding with the trial, and the case will thereafter be reviewed on the entire testimony only.

HUSBAND AND WIFE—COMMUNITY PROPERTY—LEASES—EXECUTION. A lease of community property is invalid where it was executed by the husband alone, and the wife did not authorize or assent thereto or acquiesce therein.

LANDLORD AND TENANT—VOID LEASE—ESTATE CREATED. Where a lease for the period of ten years, with monthly rent reserved, is invalid, the lessees become tenants from month to month.

PLEADING—ISSUES, PROOF AND VARIANCE. A defendant cannot complain that evidence and instructions were not applicable to the issues presented by the complaint, when such issues were brought in by his affirmative answer.

TRIAL—ARGUMENT OF COUNSEL—READING LAW. It is not error to refuse to allow counsel to read statutes or judicial decisions as part of his argument to the jury.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 11, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for unlawful detainer. Affirmed.

H. E. Foster, for appellants.

Gill, Hoyt & Frye, for respondent.

RUDKIN, J.—On the 8th day of June, 1904, Joseph Sthay and wife were the owners of the lot involved in this action,

¹Reported in 96 Pac. 232.

upon which the husband conducted a wood yard. On the above date the husband sold the wood yard, and leased the lot to the purchaser for a term of ten years, at the monthly rental of \$10 per month, payable six months in advance for the first year, and monthly in advance thereafter. On the 25th day of February, 1906, the lessee assigned his lease to the defendants, and on the 27th day of June following, Sthay and wife conveyed to the plaintiff. This action was thereafter instituted under the unlawful detainer statute to recover possession from the assignees of the lease.

The complaint alleged a letting by the plaintiff to the defendants from month to month, notice to quit, and a refusal on the part of the defendants to surrender possession. The answer denied the tenancy as alleged, admitted service of notice to quit, and a refusal to surrender possession, and set forth affirmatively the rights and claims of the defendants under the lease from Sthay and the assignments thereof. The reply denied that the defendants were holding under the Sthay lease as alleged, and attacked the validity of the lease itself on the ground that the leasehold premises were the community property of Sthay and wife; that the wife did not join in the lease or assent thereto or acquiesce therein; that the lease was not recorded, and that the plaintiff was a purchaser without notice. On these issues the case was tried, and from a judgment in favor of the plaintiff, the present appeal is prosecuted.

The refusal of the court to strike the affirmative matter from the reply is the first error assigned. In support of their motion the appellants maintain that, since the reply denied that they were holding under the Sthay lease, the validity or invalidity of that lease became immaterial. The plea that the appellants were in possession under a different lease from that set forth in the complaint was a mere argumentative denial of the allegations of the complaint, and added nothing to the denial already contained in the answer.

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Opinion Per RUDKIN, J.

Armstrong v. Musser Lumber & Mfg. Co., 43 Wash. 584, 86 Pac. 944, and cases cited. But the appellants injected that issue into the case, and the respondent had a right to question the validity of the lease on any ground he might choose so long as his defenses were not inconsistent. The denial that the appellants held under the lease was not inconsistent with a denial of the validity of the lease itself, and the motion to strike was properly denied.

The second assignment is that the court erred in denying a motion for nonsuit at the close of the respondent's case. The appellants did not stand on their motion, and we have repeatedly held that such motions are waived by proceeding with the trial, and that the case will thereafter be reviewed on the entire testimony only. After the denial of the nonsuit the trial proceeded principally on the issues presented by the affirmative answer and the reply. Under instructions from the court, which are free from objection, the jury found that the property in controversy was the community property of Sthay and wife, that the lease was executed by the husband alone, and that the wife had not authorized, assented to, or acquiesced in the lease. The lease was therefore invalid, and the lessees became tenants from month to month, such being the rent periods. *Watkins v. Balch*, 41 Wash. 810, 83 Pac. 321, 3 L. R. A., N. S., 852; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322. The month to month tenancy was terminated by the notice to quit, whether it was the tenancy described in the complaint or the tenancy under the void lease as found by the jury.

The objections to testimony and to the charge of the court are nearly all based on the ground that the testimony and instructions were not applicable to the issues presented by the complaint. But as already said, they were applicable to the issues presented by the affirmative answer, and whether these issues were properly or improperly brought into the case the appellants will not be heard to complain.

There was no error in the refusal of the court to permit counsel for appellants to read the statute or judicial decisions as part of his argument to the jury. *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79; *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. 853.

This disposes of all the assignments, and finding no prejudicial error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, ROOT, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7305. Decided June 22, 1908.]

LOUISA A. McCORMICK, Respondent, v. SEATTLE ELECTRIC COMPANY, Appellant.¹

CARRIERS—PASSENGERS—SETTING DOWN PASSENGERS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a finding that a street car step was defective, where the plaintiff, a woman weighing 250 pounds, testified that it sagged down when she stepped upon it, and caught and held the heel of her shoe.

SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—COMPARATIVE NEGLIGENCE. In an action by a passenger for personal injuries sustained in alighting from a street car, it is proper to instruct that the plaintiff is not required to be absolutely free from any neglect whatever, that that would require extraordinary care, the exercise of ordinary care being sufficient, and that plaintiff may exercise ordinary care although "guilty of slight neglect in the broadest sense of the term"; and the same does not indorse the doctrine of "comparative" negligence.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 19, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger alighting from a street car. Affirmed.

James B. Howe and A. J. Falknor, for appellant.

J. P. Ball and I. D. McCutcheon, for respondent.

¹Reported in 96 Pac. 220.

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Opinion Per FULLERTON, J.

FULLERTON, J.—The respondent recovered a judgment against the appellant for \$1,200, for personal injuries received while alighting from one of the appellant's cars on which she was a passenger. Her evidence tended to show that she boarded the car in the business section of the city of Seattle, and rode therefrom to the street on which her residence was situated, where the car stopped for her to alight; that she was somewhat corpulent, weighing nearly 250 pounds; that, when she stepped upon the car step while getting off the car, it sagged, caught and held the heel of the shoe of her right foot, preventing her from removing the foot from the car step after she had stepped to the ground with the other one; that while she was in that position the car was started, throwing her to the ground and causing the injuries for which she sued. The evidence on the part of the defense was to the effect that the respondent voluntarily stepped from the car while it was in motion, and while it was being brought to a stop, and that her fall was caused by this act on her part and not because of any negligence on the part of the appellant. Evidence was presented, also, tending to show that the car step was in good condition and would not sag when stepped upon.

Two errors are assigned by the appellant. The first is that the court erred in submitting to the jury in its instructions the question whether or not the car step was in a defective condition, contending that there is nothing in the respondent's testimony upon which to base a finding that the step was defective. But we think the evidence upon this point ample to sustain such a finding. It is true, no attempt was made to show the cause of the defect, or its nature independent of the result it produced; but, to show that it was used in the manner it was intended to be used, that it sagged down, permitting the heel of the shoe of the person using it to be caught and held when she attempted to step down therefrom, is to show a defective condition of the step, as one properly constructed and maintained will not produce such results.

The second assignment is that the court erred in giving the following charge to the jury:

"The law does not require the plaintiff in an action for personal injuries to be absolutely free from any neglect whatever in order to recover, for such a requirement would impose upon him the duty of exercising extraordinary care and prudence, which is not the standard by which his neglect is measured. All the law required of the plaintiff is the exercise of ordinary care under the circumstances surrounding him, and this he may do although he may be guilty of some slight neglect in the broadest sense of that term."

But it is manifest that the court here meant to instruct the jury that the measure of the respondent's conduct was ordinary care, and that if she exercised ordinary care in her endeavor to leave the car and was injured, she was entitled to recover even though they might find her guilty of some slight degree of negligence. This is a correct statement of the rule. The highest degree of care possible is not exacted of a passenger. He must exercise ordinary care, and when he does so and is injured by the negligence of the carrier, he is entitled to recover, even though the exercise of a higher degree of care than ordinary care on his part might have prevented the injury. The case of *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84, does not lay down a contrary doctrine. In that case the instruction of the court introduced the doctrine of comparative negligence, and it was this doctrine that the court condemned.

There is no error in the record, and the judgment appealed from will stand affirmed.

HADLEY, C. J., RUDKIN, MOUNT, CROW, Root, and DUNBAR, JJ., concur.

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Opinion Per HADLEY, C. J.

[No. 7243. Decided June 24, 1908.]

**CHRIS SEEWALD, *Appellant*, v. HARDING LUMBER COMPANY,
Respondent.¹**

MASTER AND SERVANT—NEGLIGENCE—EMPLOYMENT OF INCOMPETENT CO-SERVANT—EVIDENCE—QUESTION FOR JURY. The question of the negligence of a master in employing an incompetent engineer to run a donkey engine, used in hauling logs by a cable, is for the jury, where it appears that the engineer was a young man, about nineteen years of age, sent out by an employment office the evening before, that he was nervous and excited in attempting to operate the engine, and caused injury to the hook tender by starting the engine at full speed when directed to start it slowly; it being the master's duty to make a reasonable effort to learn his qualifications.

SAME—ASSUMPTION OF RISKS—INCOMPETENT FELLOW SERVANT. A hook tender does not, as a matter of law, assume the risk from the incompetency of the engineer of a donkey engine, where the engineer had worked but a few hours and was not known to the hook tender, whose duties in the main called him to a place where he could not carefully observe the engineer's manner of work.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 12, 1907, granting a nonsuit at the close of plaintiff's case, after a trial before the court and jury, in an action for personal injuries. Reversed.

Leo & Cass, for appellant.

Blattner & Chester, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries received by plaintiff while in the employ of the defendant. The cause came on for trial before a jury, and at the close of the plaintiff's testimony a nonsuit was granted and the action dismissed. The plaintiff has appealed.

There was evidence to the following effect, and for the purposes of this appeal it must be taken as true: The respond-

¹Reported in 96 Pac. 221.

ent, at the time appellant was injured, owned and operated a logging business in Pierce county. In the logging operations a steam engine, known as a "donkey" engine, was used in moving logs from where they were cut in the woods to the mill, or to the place where they were loaded on railroad cars for transportation. The logs were drawn by means of a steel cable, operated on a drum by the donkey engine. When a log was moved, a short wire cable, called a "choker," was passed around it and fastened near the end of the log. This was attached to the main line or cable, and when the latter was wound on the drum by the engine, the log was drawn. The appellant was known as "hook tender," and it was his duty to attend to the choker and cable and fasten them to the logs in readiness for moving. It was also his duty, as the logs were drawn, to walk along with them and to direct the course of the cable and logs so as to avoid obstructions as far as practicable. By reason of intervening obstructions, it was often necessary to stop the engine and change the course of the cable. A signalman was stationed about midway between the engineer and the hook tender and so as to be in sight of each of them. According to the situation and nature of the obstructions, it was sometimes necessary to start the engine slowly and sometimes at a high rate of speed. The hook tender who was with the logs understood the situation, and gave the signal to the signalman, to be by the latter in turn given to the engineer, when to start the engine and whether to start it slowly or rapidly. The signalman was the only medium of communication between the hook tender and the engineer as to when and how the engine should be started. There was an established code of signals, well known and understood by all woodsmen. It was the duty of the engineer to observe and obey the signals, having regard both to the proper movement of the logs and the safety of the men.

Just before the injury to appellant, the engine was stopped for the purpose of readjusting the cable and choker so as to

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change the course of the log being drawn and clear an obstruction. After the readjustment the signal was given in the manner aforesaid for the engineer to start the engine slowly. The situation of the log and the position of the hook tender were such that, for the log to clear and for the safety of the hook tender, it was necessary that the engine should start slowly. The appellant, as hook tender, was then about five hundred feet from the position of the engineer, and neither could see the other. The engineer, instead of starting the engine slowly as he was directed to do, started it at full speed. The sudden and unexpected jerk given the log caused it to dislodge a piece of timber, about eight inches in diameter and twelve feet long, and this was quickly thrown around so that it struck and broke appellant's leg, the fracture being a compound one. If the engine had been started slowly and in obedience to the signal given to the engineer, the accident would not have occurred and the appellant would not have been injured. There was testimony that the engineer then in charge was a young man, probably nineteen or twenty years of age; that he was sent out to respondent by a Tacoma employment office; that the former engineer, a competent one, was discharged, and this young man, who looked like a boy, was installed in his place the evening before this accident happened; that in attempting to operate the engine he was nervous and excited.

Incompetence of the donkey engineer and negligence of respondent in employing him constituted the ground of negligence alleged in the complaint. There was ample evidence to go to the jury as to the incompetence of the engineer, but it is contended that there was not sufficient testimony to show any negligence of respondent in the employment of the engineer and in his continuance at that post. We think, under the testimony, that question should have been submitted to the jury. It was respondent's duty to make reasonable effort to learn the qualifications of the engineer, having regard to

the safety of the other men, and it was for the jury to say whether it had learned, or by the exercise of reasonable care might have learned, of that incompetence in time to have removed him and prevented this accident. Speaking of the degree of care required of a master in the selection of servants, the court, in *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 460, 2 Sup. Ct. 932, 27 L. Ed. 605, said:

"It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered."

Tested by such rule, it was for the jury to say, under the evidence in this case, whether respondent exercised the degree of care required.

Respondent contends that appellant assumed the risk of danger from incompetence of the engineer, for the reason that he saw the latter's manner of operating and knew therefrom that he was incompetent. It must be remembered that the engineer had worked there but a few hours, and appellant had never known him before. Appellant's duties in the main called him to a place where he could not carefully observe the manner of the engineer, and under such circumstances it cannot be said, as a matter of law, that he had such knowledge of the incompetency as placed upon him the burden of assuming the risk of the danger from such a situation.

Under the evidence the question of contributory negligence was also for the jury. We therefore think the court erred in granting the nonsuit, and the judgment is reversed, and the cause remanded with instructions to grant a new trial.

MOUNT, DUNBAR, and FULLERTON, JJ., concur.

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Syllabus.

[No. 7390. Decided June 25, 1908.]

JAMES H. CAUSTEN, *Respondent*, v. E. T. BARNETTE *et al.*,
*Appellants.*¹

EVIDENCE—PAROL—WRITTEN CONTRACTS—INTENT—AMBIGUITIES—PARTNERSHIP. A contract is so ambiguous or indefinite as to admit of parol evidence of the surrounding conditions and circumstances in order to show an intent to form a partnership, where the contract provided that, in consideration of a one-third interest in all mining claims and property to be acquired, and one-third of the proceeds of a stock of goods valued at \$20,000, the plaintiff endorsed notes for \$6,000 to enable two others to take the stock into Alaska and establish a trading post and locate and deal in mining claims, etc., the notes to be paid from the profits if sufficient was realized, and the contract further providing that if the business should be continued more than one season, each of the three parties to the contract shall furnish, in addition to his services, one-third of the necessary funds for the next season.

PARTNERSHIP—CONTRACT—CREATION OF RELATION—EVIDENCE—SUFFICIENCY—ACCOUNTING. An agreement for a partnership, in effect, or at least a joint venture of a fiduciary character, with the right to an accounting for profits, is shown where, in addition to positive testimony that a partnership was intended, the contract provided that the plaintiff was to endorse notes for \$6,000 to enable the defendant and another, who originally were the sole partners in the venture, to take a stock of goods, valued at \$20,000, into Alaska and establish a trading post and store; that, in consideration thereof, he was to have a one-third interest in all mining claims and property acquired, and one-third of the proceeds of the stock, the notes to be paid from the profits if sufficient was realized; and that, if the business continued more than one season, each of the three was to furnish, besides his services, one-third of the funds necessary for the next season; and where it further appeared that the defendant and his partner in the venture had sustained a loss at sea, and being unable to proceed, had disposed of the goods at a heavy loss, and they sought assistance from the plaintiff, who personally signed the notes mentioned in the contract and procured their endorsement by a responsible party, his father-in-law, whereby the stock of goods was repurchased and transportation procured to a remote and unknown region where the trading post was established as contemplated by the two partners in the first instance.

¹Reported in 96 Pac. 225.

SAME—INEQUITABLE CONTRACT—RIGHT TO ACCOUNTING. Such a contract is not so inequitable or unjust that an accounting will not be ordered, in view of the fact that the goods were sent to a wild and unknown region, before the discovery of gold there, where the risk of loss of the goods was great and the prospects of profits uncertain.

SAME—LACHES. In such a case the plaintiff is not guilty of laches in not demanding an accounting from 1901 until 1906, where it appears that, when the notes became due, the defendant requested the consent of the endorser, plaintiff's father-in-law, to an extension of time, urging that it would be to the plaintiff's interest; that defendant, upon desiring to extend operations, had approached plaintiff for further advances and promised to make a statement of the condition of the business up to that time; and that he made no denial of the partnership and his obligation to account when interviewed by plaintiff's attorneys on the subject.

SAME—ACCOUNTING BETWEEN PARTNERS—INJUNCTION—PARTIES INJURED. Where a partner is liable to an accounting, an injunction restraining him from disposing of alleged partnership property is properly extended to enjoin certain codefendants alleged to be his friends and relatives, in whom the defendant had placed the property in furtherance of his attempt to defraud the plaintiff.

Appeal from an order of the superior court for King county, Griffin, J., entered December 19, 1907, granting plaintiff's motion for a temporary injunction after a hearing upon affidavits and other evidence. Affirmed.

Kerr & McCord, for appellants.

John F. Miller, James McNeny, and Fred H. Lyons, for respondent.

Root, J.—This appeal is prosecuted from an order granting a temporary injunction restraining the defendants Barnette, Hill, and Wood from receiving or attempting to take or receive, and from in any way disposing of, transferring, assigning, cancelling, or hypothecating certain shares of stock in the Gold Bar Lumber Company, represented by certificates issued by the company to Barnette, Wood, and Hill, and held by the Scandinavian-American Bank of Seattle, and also restraining the bank from surrendering the certificates.

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to said defendants. The defendants Barnette and Wood claim that such shares of stock, at the time of the entry of the injunctive order, were the property of the Fairbanks Banking Company, a copartnership, engaged in a general banking business at Fairbanks, Alaska, the members of which were Barnette, Hill, and Wood. The facts and circumstances under which this litigation arose were substantially these: In August, 1901, defendant Barnette and one Smith entered into a co-partnership for the purpose of building a river steamer, purchasing a stock of merchandise and supplies, and establishing a trading post or posts in Alaska, and of locating and causing to be located mining claims, and of "grub-staking" miners and prospectors, and of dealing in merchandise, supplies, mining claims, and carrying on mining business in the district of Alaska. They purchased a steamer known as the "Arctic Boy," and a stock of merchandise of the value of about \$20,000, and loaded said supplies upon the steamer to be transported to what is now known as the Tanana country. Shortly after leaving Saint Michael, and before reaching the mouth of the Yukon river, the steamer Arctic Boy became disabled and unseaworthy, and it was necessary to beach her in order to save her and the cargo. Barnette and Smith being without means to purchase another steamer or hire the merchandise transported otherwise, made a sale thereof to two men named Miller and Deane, at a large sacrifice, and temporarily abandoned their enterprise. Being desirous, however, of prosecuting their venture, they enlisted the assistance of the respondent herein, who was connected with the United States customs service and in a position to secure the financial assistance or credit necessary to further the undertaking. At the request of Barnette and Smith, the respondent secured the endorsement of their certain promissory notes, aggregating some \$6,000, and entered into and carried into effect negotiations whereby they

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secured the return from Miller and Deane of the goods they had purchased. The notes were signed by Causten himself, and their payment guaranteed by one Hastings, a man of financial ability and father-in-law of respondent. Barnette, Smith, and respondent at said time entered into the following agreement:

"This contract and agreement made and entered into this 6th day of August, 1901, by and between E. T. Barnette and Charles Smith, parties of the first part, and J. H. Causten, party of the second part, witnesseth:

"That for and in consideration of endorsements of certain notes and other valuable services furnished by the party of the second part to the parties of the first part, the said parties of the first part hereby agree and bind themselves in addition to giving the party of the second part a third interest in all mining and other properties acquired, to pay to the said party of the second part, immediately after sale, one-third of the proceeds from the sale of a certain stock of general merchandise valued at about twenty thousand dollars, which it is the intention of the parties of the first part to take to a point on the Tanana river, in the American steamer Lavelle Young, for trading purposes, after deducting therefrom the original cost and all expenses incident to the transportation and ultimate disposition of the merchandise, including the cost of the steamer 'Arctic Boy' and the following notes:

"Note dated August 6, 1901, for \$2,500 in favor of R. H. Miller.

"Note dated August 6, 1901, for \$1,680.35, in favor of E. C. Deane.

"Note dated August 7, 1901, for about \$2,000 in favor of the owners of the steamer Lavelle Young.

"Which said notes, in the event the merchandise should fail to sell for sufficient to cover all indebtedness, are to be paid pro rata from the gross receipts. That in the event the business should be continued after the winter of 1901 and 1902, each party is to furnish, in addition to his services, one-third of the necessary funds for procuring stock, transportation and all expenses necessary and requisite for plac-

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ing such stock on sale at the trading post or posts in Alaska to be operated in the season of 1902 and 1903.

"In witness whereof we have set our hands and seals in triplicate at St. Michael, Alaska, this 7th day of August, 1901.

Charles Smith.

"E. T. Barnette.

"J. H. Causten."

Barnette and Smith then proceeded up the Yukon river with the goods, and located a trading post at what is now Fairbanks, and located numerous mining claims on the Tanana river and its tributary creeks. Since that time Barnette purchased the interest of Smith in the enterprise, and has been carrying on business in various lines. He located or caused to be located numerous mining claims, and eventually entered into the banking business in connection with defendants Wood and Hill. The appellant Scandinavian-American Bank was the banking correspondent in Seattle of the Fairbanks Banking Company, composed of Barnette, Wood, and Hill. It is claimed by respondent that all of the funds used to establish the Fairbanks Banking Company and which they have used in their business came from the stock of goods hereinbefore referred to, and that the stock of the Gold Bar Lumber Company, the certificates of which are now in the hands of the Scandinavian-American Bank as the property of the Fairbanks Banking Company, is in reality property belonging to said Barnette and this respondent, and was purchased with funds traceable to the stock of merchandise taken up the river by Barnette and Smith at the time the contract was made with respondent.

It is urged by appellants that the contract entered into on the 6th of August, 1901, by and between Barnette and Smith and respondent did not constitute a partnership agreement; that respondent did not become a partner with Barnette by reason thereof, and has consequently no grounds for equitable relief. It is urged that the contract must be construed according to its terms, regardless of any evidence as to what

was said or done by the parties prior or subsequent to the execution thereof. Ordinarily a written instrument, if its language be clear and free from ambiguity, cannot be varied or contradicted by evidence of what was said or done prior to the time of its execution. But where the language employed is ambiguous or leaves it indefinite and uncertain as to what the parties intended, it is permissible to show the conditions existing at the time and the circumstances surrounding the transaction, and the words and conduct of the parties at that time in so far as they tend to explain the language of the written instrument; and where, as in this case, an accounting and equitable relief are sought by one who was a party to the written agreement and who asserts that the same was intended to be, and was, a partnership agreement, it is permissible for the court to receive evidence as to how the parties themselves have construed the written contract—as to whether the one disputing the alleged partnership has heretofore treated it as a partnership agreement. Aside from the positive evidence of several witnesses that a partnership was intended, and construing the language of this contract in the light of the circumstances surrounding the parties at the time it was executed and in the light of the conduct of the parties subsequent to its execution, we think that it was a partnership agreement somewhat akin to the grub-stake contract common in mining operations; or, if not strictly speaking a partnership, it was in effect such, and evidenced a joint venture by which a fiduciary relationship was established between respondent and appellant Barnette which justified the former in demanding and receiving an accounting and such equitable relief as would insure a realization of his property rights in the fruits of the enterprise.

In the case of *Chicago etc. R. Co. v. Denver etc. R. Co.*, 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277, the supreme court of the United States said:

“In the interpretation of any particular clause of a contract, the court is not only at liberty, but required to ex-

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amine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed."

In *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348, the court said:

"Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of the instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities."

Page on Contracts, § 1126, has the following:

"If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight. . . . Thus the practical construction by the parties may determine whether an ambiguous instrument is a partnership contract or not."

In the case of *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 969, this court used the following language:

"The rule is to so interpret the words as to carry into effect the intent of the parties as derivable from the whole instrument and surroundings, whether they have employed language accurately or not."

And in the case of *Dyer v. Middle Kittitas Irr. Dist.*, 25 Wash. 80, 64 Pac. 1009, the court spoke as follows:

"The court will, also, in determining the intention of the parties, look to the circumstances under which the contract was made, the subject-matter and the objects and purposes for which it was made."

Under this agreement, Barnette, Smith, and respondent joined in a common venture for profit. Each contributed money, goods, services, or credit, in order to make the enterprise possible, and there was a mutual agreement to divide the proceeds.

In the case of *Clafin Co. v. Gross*, 112 Fed. 386, in discussing a contract there involved, the court said:

"If this paper did not create a partnership relation between Barnitz and his associates in the enterprise, what contract relation between them did it create? Considering the paper as a whole, we find it impossible to treat it as merely providing for the payment to Barnitz of a share of the profits as a measure of compensation for services rendered to the business or for the use of money loaned or furnished in aid of the enterprise. There is, we think, no escape from the conclusion that by the terms of the written agreement Barnitz was a principal in the business conducted under it. It is clear to us that the written agreement of August 18, 1897, upon its face imports a partnership between the four persons who executed the paper."

In the case of *Ryder v. Wilcox*, 103 Mass. 24, the court said:

"In general, a participation in profits is alone sufficient to establish a partnership, unless it appears, from other circumstances and stipulations, that such was not the intention,"

In the case of *Morgart v. Smouse*, 103 Md. 463, 63 Atl. 1070, 115 Am. St. 367, the court said:

"As between the parties, partnership is a matter of intention to be proved by their express agreement or inferred from their acts and conduct. If they intend to and do enter into such a contract as in the eye of the law constitutes a partnership they thereby become partners, whether they are designated as such or not in the contract."

In the case of *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1010, the court quoted approvingly from a former decision where it was said:

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"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence."

In *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. 1076, the court used this language:

"The complainant has a special interest in the profits, and he has a right to know how the account has been kept, what the trustee has done, and the balances from time to time since the amount of the purchase price has been paid. Equity will retain jurisdiction where fiduciary relations exist between the parties, and a duty rests upon the defendant to render an account. In *Darrah v. Boyce*, 62 Mich. 486, it was said by this court: 'It is true, the relation between the parties was not that of partners, but the trust reposed in and the business to be carried on by the defendant, and the accounting he was required to make, were fully equal to those of a partnership, and quite as confidential. . . . He was in possession of all the books and accounts relating to the business, and refused to give any account of sales, or of the place where made, or the amounts received on sales. Some sort of discovery is certainly necessary, and while, to some extent, it may be obtained in a court of law, perfect and complete disclosures as to all these matters may be obtained in a court of equity.' . . . We take it to be the well-established rule that the existence of fiduciary relations between the parties is sufficient to confer jurisdiction upon a court of equity whenever the duty rests upon the defendant to render an account."

In *Marston v. Gould*, 69 N. Y. 220, the court spoke as follows:

"Whether the property in the shares purchased was in the plaintiff and defendant as partners or not, the relation between them was of the same confidential and fiduciary character as between partners, and by analogy the same remedy in equity would be had for a violation of the trust by either, and a misappropriation or diversion of the stock or funds in which they had a common interest, or from which profits were to be made. Courts of equity hold each partner responsible to the other for all losses sustained by the misconduct or

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a misapplication of the partnership funds. The same remedy exists against any one occupying the position of a quasi partner involving the same trust, duties and obligations. The action of the plaintiff was not therefore misconceived, whether it be regarded as an action for an accounting and a distribution of the profits, or for the adjustment of losses sustained by the misconduct of the defendant."

In *Hallett v. Cumston*, 110 Mass. 32, the court said:

"In this case the nature of the plaintiff's account is such that it can only be adjusted by a full examination and settlement of all the accounts and business of Cumston. He is entitled to his share of the net profits of the business. The difficulty in settling the account is the same as if he had been a partner. Complicated accounts of this character cannot be conveniently or accurately investigated and adjusted by a jury in an action at common law."

In *Garr v. Redman*, 6 Cal. 575, the court, speaking of the action, said:

"The action was properly filed for an account, whether the parties were technically partners or not. The character of the contract set out in the bill made an account necessary to determine their respective right."

See, also, *Brigham v. Dana*, 29 Vt. 1; *Cochrane v. Adams*, 50 Mich. 16, 14 N. W. 681; 23 Cyc. 452; 2 Lindley, Partnership, 493; Bishop, Contracts, § 404; *Rathbun v. McConnell*, 27 Neb. 239, 42 N. W. 1042; *Thompson v. Thompson*, 41 Ky. 161; *Miller v. O'Boyle*, 89 Fed. 140; Bates, Partnership, 30, 794; 22 Am. & Eng. Ency. Law (2d ed.), 27-29; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355; *Lawrence v. Halverson*, 41 Wash. 534, 83 Pac. 889; *Miller v. Price*, 20 Wis. 124; *Webster v. Clark*, 34 Fla. 637, 48 Am. St. 217, 27 L. R. A. 126.

It is urged by appellants that the agreement, if construed as a partnership, would be inequitable and unjust, and that it would be unconscionable to enforce it. It is not the purpose of this action to keep the agreement alive and further

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enforce it; but to obtain an accounting. We can hardly regard the contract as inequitable and unjust, when we take into consideration the circumstances under which it was made. Barnette and Smith were practically helpless financially; they were unable to proceed with their enterprise without assistance. Respondent signed their promissory notes and induced others to sign and guarantee their payment. He assumed a large risk in so doing. Had the steamer that carried the goods been lost at sea or wrecked while going up the river, or had the goods been destroyed or lost otherwise, Barnette and Smith would have been left without means to pay the notes, and respondent would have been liable for their payment. They were venturing an enterprise in a wild, unsettled, and comparatively unknown region. They established a trading post at the place where the city of Fairbanks has since been builded. At that time gold had not been discovered in that locality, and was not until one or two years thereafter. This discovery was a most fortunate occurrence for the enterprise which these three men had undertaken, and but for it the outcome would doubtless have been very different from what it has been. On the part of respondent, it was one of those venturesome projects which are occasionally witnessed in a mining region, where men often risk their time, efforts, and money on a chance. The undertaking having resulted profitably, we think respondent is entitled to just treatment in the division of the proceeds. Of course, we are not at this time called upon to consider what character of division would be just and equitable.

It is also urged that respondent has been guilty of laches. We do not think the evidence sustains this contention. It does not appear that Barnette disputed the partnership of respondent until shortly before the commencement of this action in 1906. When the notes hereinbefore mentioned came due, Barnette was unable to pay them and desired an extension. In order to secure this, it was necessary that Mr.

Hastings, the guarantor, should consent thereto. The latter testifies that Barnette, in requesting the extension, urged that it would be to the interest of Mr. Hastings' son-in-law, this respondent. There is evidence to show that when respondent and his attorneys interviewed Barnette relative to an accounting, he made no denial to them of the partnership or of his obligation to account to respondent. It is in evidence that, when he was desiring to extend his operations, he approached respondent for a further advancement of funds, and upon being asked for a statement of the condition of the business up to that time, promised to make the same.

It is further urged by the appellants that, even if it be found that there was a partnership between Barnette and respondent, yet that the injunction should be dissolved in so far as it affects the stock of the Gold Bar Lumber Company, or at least in so far as it affects the interests of appellants Wood and Hill therein. It is the contention of the respondent, however, that all of this property and all of the property of the Fairbanks Banking Company belongs to the partnership consisting of respondent and Barnette; that Barnette, as a part of the scheme to defraud respondent, caused much property to be placed in the names of relatives and friends, and that the interests in the name of Wood and Hill were placed in their names by Barnette as a part of his said scheme. The injunction was based, not only upon affidavits, but also upon the evidence taken in the case up to that time. This evidence is voluminous, and there is considerable conflict therein as to some of the matters involved. The trial court had the advantage of seeing and hearing the witnesses who appeared before him. Giving careful consideration to the admitted facts in the case and to all of the evidence, we think the trial court was right in concluding that respondent was entitled to an accounting and that the injunctive relief requested was appropriate. The conduct of appellant Barnette in connection with the suit is not calculated to inspire

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the greatest confidence. It appears that he concealed himself and endeavored to avoid service of summons. Upon the witness stand, before a notary public at Fairbanks who had been agreed upon to take the evidence, he refused to answer many pertinent questions propounded by respondent's attorney, and many of the answers he gave were evasive. It also appears that, after a stipulation had been made between the attorneys for the respective parties, under the terms of which the books at Fairbanks were to be examined by respondent or his attorneys, Barnette and his attorneys (not the attorneys of record here) repudiated said stipulation and refused to allow respondent's attorneys to examine the books, after the latter had gone to Fairbanks for that purpose. The trial court thereupon made an order for appellants to bring said books into court, which order they have ignored and refused to comply with. It is also contended that appellant Hill aided appellant in violation of the trial court's order to not remove from the jurisdiction of the trial court to Alaska some \$60,000 of the funds claimed to belong to respondent and Barnette, and that the latter was about to, and would have, removed all of the personal property in which respondent was interested, from the jurisdiction of the court, had it not been for the injunctive order.

We think the order was justified by the showing made, and it is hereby affirmed.

HADLEY, C. J., MOUNT, CROW, DUNBAR, and FULLERTON,
JJ., concur.

[No. 6889. Decided June 27, 1908.]

OSCAR SATHER, Respondent, v. HOME SECURITY SAVINGS BANK et al., Appellants, AMERICAN MILL AND TIMBER COMPANY, Defendant.¹

CORPORATIONS—STOCK—SALES—RESCISSON—FRAUD—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the rescission of a sale of stock for fraudulent representations, where it appears that plaintiff had agreed to purchase stock in a mill company as a condition of securing employment, and the representations of the officers of the company complained of related to matters of opinion as to the value of stock, for which plaintiff paid \$500 for stock of the par value of \$2,000, such fact showing that the stock was not at par and being sufficient to put him on inquiry; and the purchaser being an experienced millman who made an inspection of the mill and was competent to estimate its value; and where plaintiff chiefly relied upon representations as to skid roads and buildings on the property of the company, when those matters did not occasion the loss.

SAME—TRANSFER OF STOCK. Money paid for stock sold and assigned cannot be recovered on the ground that the deal was not consummated because the stock was not transferred on the books of the company, where there was no obligation to get the stock so transferred; the stock belonging to the purchaser as soon as paid for.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered April 20, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover money paid for corporate stock. Reversed.

Hardin & Hurlbut (Dorr & Hadley, of counsel), for appellants.

Pemberton & Sather, for respondent.

Root, J.—This action was brought by plaintiff to recover \$500 left by him with the Home Security Savings Bank, a corporation, for the purchase of twenty shares of stock in the

¹Reported in 96 Pac. 229.

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American Mill and Timber Company, a corporation. From a judgment in favor of plaintiff, the defendant bank and Charles Cissna appeal.

Plaintiff in his second amended complaint alleges, in substance, that, in October, 1905, he sought employment as filer in the mill of defendant American Mill & Timber Company, and the officers of that company required him to take twenty shares of stock in said company and pay therefor \$500 as a condition precedent to his acting as filer; that the president of said company referred plaintiff to appellant Cissna, stating that the latter would act as the company's agent in the matter; that plaintiff on October 14, 1905, did arrange with appellant Cissna to raise \$500 upon notes and a real estate mortgage given by plaintiff and wife to appellant bank, the mortgage being for \$700 principal and \$126.20 interest added to the principal for the term of the loan; that plaintiff was to leave \$500 of the loan in escrow with appellant bank and appellant Cissna, who was acting as plaintiff's agent for the purchase of said stock, the plaintiff reserving all rights to review the acts of said Cissna before finally accepting the stock. It further alleges that appellant Cissna and his son told plaintiff that defendant American Mill & Timber Company was in good financial condition, owned its mill plant and all machinery connected with the same and the lands where the mill was located, all of which he, the said Cissna, knew at the time to be false; that about October 20, 1905, plaintiff inquired of the president of said American Mill & Timber Company about plaintiff's stock, and was told that said company was in such financial embarrassment that the stock could not consistently be turned over to plaintiff. Plaintiff further alleges that appellant Cissna acted as the agent for plaintiff and also as agent for American Mill & Timber Company, and for the owners of the stock which the plaintiff was to purchase, and had an interest in said stock by way of a mortgage thereupon, and upon the plant of the

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American Mill & Timber Company, which facts he did not disclose to plaintiff; that plaintiff had demanded return of \$500, and the payment of the same had been refused.

Appellants, in their answer to the second amended complaint, deny that they, or either of them, were at any time agents for defendant American Mill & Timber Company, or for plaintiff; deny that \$500, or any other sum, was left in escrow by plaintiff with appellant bank; deny that plaintiff reserved any right to review the acts of said appellant; deny that appellant Cissna, or his son, made representations to plaintiff as to the financial condition of the American Mill & Timber Company, or as to the property owned or controlled by it; deny that the bank had a mortgage on the stock in question, or upon the property of the American Mill & Timber Company; and allege affirmatively that, on October 14, 1905, plaintiff negotiated a loan of \$700 from appellant bank, and that plaintiff and wife executed and delivered to the bank promissory notes aggregating \$826.20, secured by a real estate mortgage; that, at the time of obtaining the loan, plaintiff instructed appellant bank to pay \$500 of said amount to Leroy B. Simpson, for twenty shares of the capital stock of the American Mill & Timber Company, at the par value of \$100 each, which stock was originally owned by one Hooker, and was held by the bank as collateral security for a debt by Simpson to the bank, which stock plaintiff was purchasing from Simpson; that the bank, in pursuance of said instructions by plaintiff, paid the \$500, so loaned, to Simpson on October 16, 1905; that at said time it was agreed between plaintiff and appellant bank that the stock issued to Simpson as aforesaid and endorsed for the purpose of said transfer by Simpson, or stock issued in place and in lieu of the said Simpson stock, should be left with the appellant bank as additional and collateral security for the loan, and that the same was so left as collateral security.

Plaintiff's reply denies the affirmative matter in the answer, except that \$500 was left for the purchase of twenty

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shares of stock and that the stock was, when purchased, to be left as additional and collateral security for the loan. Prior to May 15, 1905, Home Security Savings Bank became the owner of certain mill property and timber rights by bidding in the same at sheriff's sale upon execution, and on the 15th day of May, 1905, the appellant bank contracted with defendant American Mill & Timber Company to sell to it "all its right, title and interest" in the mill plant for \$18,000, \$5,000 of which was paid in cash and the remainder was to be paid in installments of \$500 per month, and under said agreement, the said American Mill & Timber Company went into possession of the mill plant and property, and held possession thereof until the latter part of the month of October, 1905, when it abandoned the property and forfeited all its rights under the agreement, and the appellant bank again took possession of the property. On September 22, 1905, Leroy B. Simpson gave appellant bank his note for \$500, and as collateral security deposited with the bank twenty shares of stock of the American Mill & Timber Company, of the par value of \$100 each, which stock was commonly known as the Hooker stock, being certificate No. 7, which was assigned to, and received by, Leroy B. Simpson about September 22, 1905, and then delivered to the corporation, and it issued to Simpson in lieu thereof certificate of stock No. 11 for a like number of shares. Said certificates No. 7 and No. 11 were placed in the hands of appellant bank and retained by it at all times while it held the promissory note of Simpson, each of the certificates representing the same capital stock which was held as collateral security for said note. About October 14, 1905, plaintiff and defendant American Mill & Timber Company entered into an agreement whereby the company employed plaintiff as filer in its mill and whereby plaintiff would purchase \$500 worth of stock. On October 14, 1905, Leroy B. Simpson gave appellant bank an order in writing to turn the Hooker stock over

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to plaintiff, and on October 16, 1905, appellant bank paid \$200 of the \$700 borrowed by plaintiff from the bank to perfect the title of plaintiff and wife to the real estate mortgaged by plaintiff and wife to the bank, and applied the other \$500 to the payment of the Simpson note and the release of the stock accompanying said note as collateral. On October 24, 1905, appellant bank loaned defendant American Mill & Timber Company \$2,800 for the purpose of meeting outstanding bills under the terms of a certain agreement then entered into. The bank placed this amount to the credit of said company and paid on orders of the American Mill & Timber Company about \$1,800 or more, when it ascertained, about October 25, that the moneys were not being applied for the purpose provided in said agreement, and the bank thereupon charged off the remainder of the \$2,800 and declined to pay further orders, and the American Mill & Timber Company immediately abandoned the property and its business, and appellant bank took possession of the property under the terms of the contract of sale by the bank to the timber company.

Respondent's alleged cause of action appears to lie in the charge, that appellant Cissna did not make such a disclosure to him of the affairs of the timber company as it was his duty to make under the circumstances; that, by reason of this suppression of the truth and by reason of Cissna's expression of confidence in the value of the stock, respondent was induced to part with his money. After a careful examination of the pleadings and the evidence, we are unable to find adequate support for this contention. Respondent admits that he applied for the position of saw filer, and was told that he could have the same only upon condition of his acquiring \$500 worth of stock. He says the timber company directed him to go to the bank to make arrangements about the purchase of such stock, and told him that the bank's officers would give him full and reliable information as to the timber

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company's financial affairs. He went to the bank and applied for a loan with which to purchase the stock, and talked with Cissna, the bank's president, who told him of the indebtedness of the company to the bank. Mr. Cissna's son, who was also connected with the bank, went with respondent to examine certain real estate which the latter offered as security for the loan. Subsequently the loan was made in the sum of \$700. Respondent asserts that Cissna told him the stock was worth par and that he was getting a good bargain, and that his son did the same. Both Cissna and the son dispute this.

As his chief complaint, respondent asserts that certain buildings of the timber company were not upon the land owned by it, and that certain skid roads upon which logs were hauled across the premises of others were there without the latter's consent, and that these matters made the property useless. What Cissna and son may have said about the value of the stock, if anything, could have been but a matter of opinion. It could scarcely be said to have misled respondent seriously, because the very fact that he was securing twenty shares of the face value of \$2,000 for the sum of \$500 would seem to be a circumstance well calculated to indicate that the stock was not at par, and to have put him upon inquiry. It is questionable whether appellants were under obligation, under pain of personal liability, to tell respondent everything they knew about this timber company and its property. But assuming that they were, we do not think that it is made to appear that the suspension of business by the timber company and the turning over of the property by it to the appellant bank was occasioned by reason of any trouble relative to the buildings or the skid roads. The fact that the bank some time after the purchase of the stock by respondent made a loan of \$2,800 to the timber company, would seem to indicate that it did not at that time regard the timber company as insolvent or in failing circumstances,

or unable to go on with its business because of the trouble about buildings, skid roads, or anything else; but it appears to us that the cause for the suspension of business by the timber company was its difficulty with the bank in regard to the manner in which it was using the \$2,800 which it had recently borrowed, the bank claiming that the timber company, instead of paying its bills with this money, as it had agreed to do, was drawing and using the money for other purposes.

It is contended by respondent that the purchase of the stock was never consummated, and that he is therefore entitled to the return of his \$500. This contention is based upon the fact that the timber company never issued any certificate of stock in lieu of the certificate left in the bank by Simpson, and for the payment of which the bank applied respondent's \$500. We do not find anything in the evidence sufficient to prove that the bank was under any obligation to get this stock transferred on the books of the timber company. Simpson had left the stock in the bank as security upon a loan for which the bank held his note. In writing he authorized the bank to turn over the stock to respondent as soon as paid for. Respondent's \$500 was applied to the payment of this note, and suitable entries made in the books of the bank at that time to indicate such payment, although the note remained in the bank until long afterwards. The stock became respondent's when the \$500 was thus applied as payment therefor. The respondent was a man of fifteen year's experience in the mill business, and testified that he personally examined this mill and its facilities for doing business, and that he was competent to judge of the value of mill property. There is no claim that any question was ever asked the bank or any of its officers by respondent about the location of the buildings or the skid roads, and no misrepresentation is charged other than that alleged to have been made by the bank's officers relative to their opinion of the bargain

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respondent was getting in making the purchase of the stock. Respondent knew the character of the property and knew the financial condition of the company, and took his chances upon the stock proving valuable or otherwise. The position of the buildings and the difficulties as to the skid roads not having in our opinion occasioned the loss which respondent sustained as a stockholder, we are unable to find facts showing a liability on the part of appellants. We think respondent failed to establish his case by a fair, or any, preponderance of the evidence.

As to appellants, the judgment of the honorable superior court is reversed, and the cause remanded with directions to dismiss the action.

HADLEY, C. J., MOUNT, RUDKIN, and CROW, JJ., concur.

[No. 7285. Decided June 29, 1908.]

**H. G. ROWLAND *et al.*, Appellants, v. JONAS ESKELUND,
Respondent.¹**

APPEAL—REVIEW—FINDINGS. Findings of the trial court in an equitable case, upon conflicting evidence, where the judge visited the premises and saw most of the witnesses, will not be disturbed where there is room for difference of opinion, and the same is amply sustained by the evidence.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 23, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury. Affirmed.

Walter Christian and H. G. & Dix H. Rowland, for appellants Rowland *et al.*

James M. Ashton, for appellant Peirce.

H. F. Norris and T. W. Hammond, for respondent.

¹Reported in 96 Pac. 426.

[No. 6889. Decided June 27, 1908.]

OSCAR SATHER, Respondent, v. HOME SECURITY SAVINGS BANK *et al.*, Appellants, AMERICAN MILL AND TIMBER COMPANY, Defendant.¹

CORPORATIONS—STOCK—SALES—RESCISSON — FRAUD — EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the rescission of a sale of stock for fraudulent representations, where it appears that plaintiff had agreed to purchase stock in a mill company as a condition of securing employment, and the representations of the officers of the company complained of related to matters of opinion as to the value of stock, for which plaintiff paid \$500 for stock of the par value of \$2,000, such fact showing that the stock was not at par and being sufficient to put him on inquiry; and the purchaser being an experienced millman who made an inspection of the mill and was competent to estimate its value; and where plaintiff chiefly relied upon representations as to skid roads and buildings on the property of the company, when those matters did not occasion the loss.

SAME—TRANSFER OF STOCK. Money paid for stock sold and assigned cannot be recovered on the ground that the deal was not consummated because the stock was not transferred on the books of the company, where there was no obligation to get the stock so transferred; the stock belonging to the purchaser as soon as paid for.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered April 20, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover money paid for corporate stock. Reversed.

Hardin & Hurlbut (Dorr & Hadley, of counsel), for appellants.

Pemberton & Sather, for respondent.

Root, J.—This action was brought by plaintiff to recover \$500 left by him with the Home Security Savings Bank, a corporation, for the purchase of twenty shares of stock in the

¹Reported in 96 Pac. 229.

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American Mill and Timber Company, a corporation. From a judgment in favor of plaintiff, the defendant bank and Charles Cissna appeal.

Plaintiff in his second amended complaint alleges, in substance, that, in October, 1905, he sought employment as filer in the mill of defendant American Mill & Timber Company, and the officers of that company required him to take twenty shares of stock in said company and pay therefor \$500 as a condition precedent to his acting as filer; that the president of said company referred plaintiff to appellant Cissna, stating that the latter would act as the company's agent in the matter; that plaintiff on October 14, 1905, did arrange with appellant Cissna to raise \$500 upon notes and a real estate mortgage given by plaintiff and wife to appellant bank, the mortgage being for \$700 principal and \$126.20 interest added to the principal for the term of the loan; that plaintiff was to leave \$500 of the loan in escrow with appellant bank and appellant Cissna, who was acting as plaintiff's agent for the purchase of said stock, the plaintiff reserving all rights to review the acts of said Cissna before finally accepting the stock. It further alleges that appellant Cissna and his son told plaintiff that defendant American Mill & Timber Company was in good financial condition, owned its mill plant and all machinery connected with the same and the lands where the mill was located, all of which he, the said Cissna, knew at the time to be false; that about October 20, 1905, plaintiff inquired of the president of said American Mill & Timber Company about plaintiff's stock, and was told that said company was in such financial embarrassment that the stock could not consistently be turned over to plaintiff. Plaintiff further alleges that appellant Cissna acted as the agent for plaintiff and also as agent for American Mill & Timber Company, and for the owners of the stock which the plaintiff was to purchase, and had an interest in said stock by way of a mortgage thereupon, and upon the plant of the

[No. 7267. Decided June 29, 1908.]

**FRANK HOSETH, Respondent, v. PRESTON MILL COMPANY,
Appellant.¹**

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE—ADMISSIBILITY—APPEAL—REVIEW—HARMLESS ERROR. In an action for personal injuries sustained through an alleged defective swamp hook and lead line, it is competent for the defendant to show that the hook and line were, while in the same condition, used several days after the injury in the same work, and worked perfectly; but its exclusion is not prejudicial error where there was testimony that the same had been used in the same way for eighteen months prior to the accident.

EVIDENCE—CONCLUSIONS—MASTER AND SERVANT—WARNING. It is not error to exclude evidence that a man could not remain in a logging camp a single day without hearing warnings to keep away from the lead lines, the same being a conclusion for the jury.

SAME—APPLICABILITY TO ISSUES. Testimony as to what might have happened, upon a contingency as to which there was no evidence in the case, is properly excluded.

MASTER AND SERVANT—SAFE APPLIANCES—KNOWN DANGERS—INSTRUCTIONS AS TO CORRESPONDING DUTIES—TRIAL—INSTRUCTIONS AS A WHOLE. It is not prejudicial error in an action for injuries sustained by a signalman in a logging camp, through the breaking of a swamp hook, to instruct that the master and servant do not stand upon a footing of equality as to the knowledge of danger, where the instruction is immediately followed by full and proper instructions as to the corresponding duties of the parties which, taken as a whole, were favorable to appellant.

DAMAGES—PERSONAL INJURIES—RESULTING DAMAGES—REBREAKING OF LEG. In an action for personal injuries from the breaking of a leg, where, three months after the accident, the plaintiff was permitted by the physician to go about on crutches and fell and rebroke his leg, he may recover the entire damages sustained, if he exercised reasonable care at the time of the fall, and if the second injury was attributable to the first.

SAME—INSTRUCTIONS. An instruction as to damages caused by a fall from crutches three months after the original injury, to the effect that plaintiff is not guilty of negligence in using the leg before complete recovery, with permission of the physician, in "the absence of bad faith," and may recover for injuries while walking

¹Reported in 96 Pac. 423.

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around "in good faith" is erroneous, in failing to require reasonable care by the plaintiff; and is not cured by a contradictory instruction on the subject of "contributory" negligence.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 22, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a signalman employed in a logging camp. Reversed.

Shank & Smith, for appellant.

Martin J. Lund and Vince H. Faben, for respondent.

RUDKIN, J.—This action was instituted in the court below to recover damages for personal injuries. At the time of receiving the injuries complained of, the plaintiff was in the employ of the defendant in one of its logging camps, and was standing near a cable extending from the logging engine out into the forest, for the purpose of transmitting signals from the men in the forest to the engineer. In transmitting the signals, the plaintiff stood within ten or twelve feet of a large stump to which a snatch block was anchored for the purpose of holding the cable in place. The snatch block was fastened to the stump by a lead line which was wrapped one and one-half times around the stump, and a swamp hook attached to the end of the line was hooked or fastened into the body of the stump. While the plaintiff was occupying this position, the strain on the cable caused the swamp hook at the end of the lead line to give way, and the hook or line struck him, fracturing his leg and arm. The specific acts of negligence charged in the complaint were the use of a defective and inadequate hook, and the failure to securely fasten the hook in the stump. The answer denied the negligence charged in the complaint, and alleged affirmatively contributory negligence on the part of the plaintiff and negligence of a fellow servant. The trial resulted in a judgment in favor of the plaintiff, from which the defendant has appealed.

In the course of the trial the appellant offered to prove that the swamp hook and lead line which caused the injury were afterwards used for two or three days in the same work, while in the same condition, and with the same set in the stump, and that they worked perfectly. This testimony was competent and should have been admitted. *Tremblay v. Harnden*, 162 Mass. 383, 38 N. E. 972; 2 Labatt, Master and Servant, § 822. Testimony was received, however, showing the use of the same appliances, in the same manner, for a period of eighteen months prior to the accident, and we do not think that the exclusion of testimony tending to show a like use for two or three days after the accident would be sufficiently prejudicial to warrant a reversal.

The appellant further offered to prove that a man could not remain in its logging camp for a single day without hearing many times a warning to keep away from the lead line. The appellant might doubtless show the nature of the warnings given, how often the warnings were repeated, and the opportunity of the respondent for hearing the warning, but the conclusion that the respondent could not remain about the camp for as much as a day without hearing the warnings many times was for the jury, and not for the witnesses. There was no error in the ruling complained of.

The appellant objected to the following question propounded to one of its witnesses on cross-examination, for the reason that the question was not based on any issue in the case, but the objection was overruled:

"Q. Suppose that a hook weighing one hundred and fifty pounds, or one hundred pounds, or sixty pounds, we will say, was flying around that stump with such terrific force as might be expected in a case of this kind, and the hook and strap became disengaged from the pulley and shear block; don't you think it had sufficient force to travel probably one hundred feet, if there was nothing in the way?"

There was no pretense that the hook or strap became disengaged from the pulley or shear block, and what might or

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might not happen in such a contingency would seem utterly immaterial in this case. The objection should have been sustained.

On the question of contributory negligence the court instructed the jury as follows:

"The court instructs the jury that the plaintiff would not be entitled to recover if he by his own negligence contributed to his injury, that is, if such negligence on his part was the proximate cause of the injury, and that the accident would not have occurred had it not been for the negligence of the plaintiff."

The giving of this instruction is assigned as error. The particular objection urged against the instruction is that the jury were left to infer therefrom that the negligence of the servant alone must be the proximate cause of the injury in order to defeat a recovery. The true rule is that if the combined negligence of the master and servant is the proximate cause of an injury and the negligence on the part of the servant proximately and naturally contributes to that injury there can be no recovery. *McLeod v. Spokane*, 26 Wash. 346, 67 Pac. 74. Whether the instruction as given was misleading or not we need not inquire, as the judgment must be reversed on other grounds.

The giving of the following instruction is further assigned as error:

"I instruct you that the master and servant do not stand upon an equal footing even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has a right to rely upon the superior skill and knowledge of the master. The servant is not entirely free to act upon his own suspicions of danger."

The instruction complained of was followed by these instructions:

"If you believe from the evidence that it was dangerous to stand or be near the stump where this accident is alleged to

have occurred and that the danger of such position was alike open and obvious to the master and the servant, and that the plaintiff knew of the danger, or by the exercise of reasonable care or caution could have known of the danger, then both the master and the servant are upon an equality and the master is not liable for an injury resulting from dangers incident to the employment."

"The very conditions of danger which impose upon the master the duty of care in the selection of the hook and in its use also impose a corresponding duty of care upon the servant. The master has a right to suppose that the servant will be alert and observe that diligence to detect and avoid danger which a man of ordinary prudence would exercise for self preservation under like conditions. If you find from the evidence that the plaintiff was not alert and did not observe that diligence both to detect and avoid dangers which a man of ordinary prudence would exercise for self preservation under similar conditions, then your verdict will be for the defendant."

"The defendant was not required, in order to relieve itself of liability, to call the attention of plaintiff to every special risk from which an injury might result. If defendant warned the plaintiff of the general dangers incident to his employment, or if the plaintiff knew or should have known in the exercise of ordinary care as a man of ordinary intelligence and prudence, that such dangers existed, then plaintiff cannot recover."

The abstract question embodied in the charge excepted to was considered by this court in *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711, and other cases, and the instruction was disapproved as a general statement of the law applicable to all cases of this character. But while the instruction excepted to may not be sound in law and was in direct conflict with the instructions immediately following, yet the charge on this point when taken as a whole was very favorable to the appellant, and we do not think that it could be in any manner prejudiced thereby.

On the question of the right of the respondent to recover for injuries resulting from a fall some three months after the

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original injury complained of, the court instructed the jury as follows:

"The court instructs as to the measure of damages, if you should find from the evidence in this case, under the instructions of the court, that the plaintiff is entitled to recover, then the court instructs you that any damages that the plaintiff has suffered by reason of his having fallen and rebroken his leg could not be included. He would only be entitled to recover for the damages which he sustained as a direct result of the injury complained of in the complaint. The court means by the direct result of the injury, that which flows directly from the accident, and even though the rebreaking of the leg would not have happened had not the original injury been received, yet the plaintiff would not be entitled to compensation for this additional injury.

"But I further instruct you that a person injured through the negligence of another is only required to use reasonable care to effect a cure, and where there has been no negligence on the part of the injured, and his injuries result more seriously than it was at first supposed they would, there should be a full recovery for the entire result. A person injured cannot be held guilty of negligence in using the injured limb before a complete recovery, under the orders and directions of his physician, in the absence of bad faith, and if you find from the evidence before you that the plaintiff, after his limb had been set, while walking around upon crutches in good faith, at the direction and permission of his physician, slipped and rebroke his limb, and that such rebreaking of the limb would not have occurred but for his original injury, then the injury causing the original fracture was the proximate cause of the rebreaking, and the plaintiff is entitled to recover, if you find for him, for the entire result to him."

To a proper understanding of these instructions, a brief reference to the facts becomes necessary. About three months after the respondent received his original injury, he was permitted by his physician to go about the hospital wards on crutches, and as he was ascending the stairs from the wards one of his crutches slipped on the landing and he fell to the floor, rebreaking his leg. It is apparent on inspection that

the instructions last quoted are conflicting. The jury were first told that the respondent could not recover damages for the additional injuries caused by the rebreaking of the leg, and later that he could recover for such injuries under certain conditions. The first part of the charge was clearly erroneous, but was favorable to the appellant, and if the latter part of the charge declared the law correctly there was no prejudicial error. The rule is that the injured person must exercise reasonable care to effect a cure, both as to the selection of a physician and as to his own personal conduct, and if he does so he may recover all damages flowing naturally and proximately from the original injury. And in this case if the respondent was out on crutches under the instructions of his physician, and was in the exercise of due and reasonable care at the time of his fall, he may recover the entire damages sustained, provided of course the second injury was attributable to and would not have occurred except for the original injury. *Rowe v. Whatcom County R. & Light Co.*, 44 Wash. 658, 87 Pac. 921; *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444, 31 South. 527; 18 Cyc. 76 *et seq.*

But this question was not clearly or fairly submitted to the jury. All that was required of the respondent to entitle him to recover for the additional injury was that he was walking about in good faith at the time, at the direction and permission of his physician. The term, *in good faith*, as used in this instruction is not the equivalent of, with due and reasonable care, and was not so intended. It was preceded by the expression, *in bad faith*, and the expressions, *in good faith*, and *in bad faith*, as here employed could only refer to the conduct of the respondent in following out the advice and instructions of his physician. They did not refer to his personal conduct in looking out for his own safety and welfare. Nor was this defect in the charge cured by the instructions on contributory negligence, for the negligence of the respondent in falling and rebreaking his leg, if he was negligent,

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was not strictly speaking contributory negligence at all. Inasmuch as the damages in this case arose largely from the second fracture of the leg, it was of the utmost importance to the appellant that the jury should be fully and fairly instructed as to its liability for such additional injuries, and we think the charge insufficient and faulty in this respect.

The denial of a motion for nonsuit is also assigned as error. There was competent testimony tending to show that the hook used was defective, and was not securely fastened in the stump, and the weight of this testimony was for the jury. The record does not show contributory negligence on the part of the respondent, as a matter of law, and the motion for nonsuit was properly denied. There are some other assignments of minor importance, but the rulings complained of will not occur on a retrial, and we deem it unnecessary to discuss them. Some of the errors we have pointed out are not of sufficient moment to warrant us in disturbing the judgment, but for error in the instructions on the measure of damages and the right of recovery for injuries resulting from the rebreaking of the leg, the judgment is reversed and a new trial ordered.

HADLEY, C. J., FULLERTON, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 7318. Decided June 29, 1908.]

WILLIAM E. BOWEN, *Appellant*, v. DEMPSEY LUMBER COMPANY, *Respondent*.¹

VENDOR AND PURCHASER—CONTRACTS—PERFORMANCE. A contract by a vendee to build a mill on the property purchased by January 1st, 1907, is substantially complied with so as to avoid the payment of \$20,000 stipulated damages for failure to do so, where it appears that the contract stipulated that if the vendee failed to secure reasonable assurance of the construction of a spur track to the mill from a railroad company, then it should have fourteen months from and after receiving such assurance within which to complete the contract, and it appeared that the vendee only received an expression of opinion and no positive assurance as to the spur track until April 15, 1906, and completed the mill April 27, 1907.

Appeal from a judgment of the superior court for Pierce county, Carey, J., entered November 26, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

E. R. York and T. W. Hammond, for appellant.

James M. Ashton and W. H. Hayden, for respondent.

HADLEY, C. J.—This is an action to recover liquidated damages for an alleged breach of contract. The defendant had for several years been purchasing timber in the state of Washington, and had, after investigation of different sites, determined to construct a sawmill at Everett, for the purpose of manufacturing the timber into lumber. About this time the Tacoma chamber of commerce learned of the purpose of the defendant, and at once sought to induce it to locate its mill in Tacoma. A proper site for the mill purposes being an important element, the plaintiff and the defendant were brought together through the instrumentality of the chamber of commerce, to negotiate for a site upon certain Tacoma

¹Reported in 96 Pac. 427.

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tide lands for the purchase of which the plaintiff held a contract from the state of Washington. The plaintiff in his own name held the contract for the purchase from the state, but he in fact represented a syndicate composed of several persons. In this way he held the contract with the state for the purchase of about one hundred and four acres of tide lands lying east of the Puyallup river, in front of Tacoma, and he and his associates were seeking a purchaser.

After negotiations, the plaintiff and defendant reached an agreement whereby the plaintiff was to transfer to the mill company forty acres of this land, the consideration being that the mill company should pay \$1,000 per acre and build on the land conveyed a sawmill with capacity equal to that of the new mill of the St. Paul & Tacoma Lumber Company. The agreement provided that the mill company should commence the construction of the mill during the year 1905, and have the same finished and in actual operation on or about the 1st day of January, 1907, and in default thereof should pay the plaintiff the sum of \$20,000 as agreed and liquidated damages. It was, however, recited in the agreement that the mill company was then negotiating with the Northern Pacific Railway Company for the construction of a spur track from its railroad to the land, and it was agreed that, if the mill company failed to receive from the railway company during the year 1905 reasonable assurance that it would construct the spur track to the mill site, then the mill company should be allowed sufficient additional time within which to complete the mill to make fourteen months from and after the date of receiving such assurance. Under this agreement the mill company paid the plaintiff the \$40,000 cash on the purchase price, and undertook the construction of the mill on the terms aforesaid and as an additional part of the purchase price. The lands were at the time valued at materially more than \$1,000 per acre, and the plaintiff accepted the prospective enhancement in value of his adjoining tide lands

by reason of the construction of the mill as the equivalent of the additional value. The remaining lands were afterwards sold by plaintiff for \$3,000 per acre.

In pursuance of the aforesaid agreement, the mill company repeatedly negotiated with the railway company and urged the latter to give reasonable assurance that the spur track would be built. During these negotiations the mill company learned that the railway company would not enter into an agreement obligating it to construct the spur, and furthermore that it was not in position to make such agreement or give reasonable assurance that it would build the extension, for the reason that it had not a franchise from the city or the permission of the government to bridge and cross the Puyallup river, or a right of way across private property, all being necessary in order to reach the property of the mill company. On December 13, 1905, the engineer of the railway company wrote a letter to the mill company, expressing his belief that the spur would be constructed by April 15, 1906, the letter being a mere expression of opinion and containing no positive assurance or obligatory promise that it would be constructed. After that time the railway company was engaged in litigation concerning its right of way over private property for this spur track, the litigation involving the actual right to condemn, it being contended that the purpose was for a private and not a public use. These legal impediments were not finally terminated and removed until the latter part of June, 1906. Meantime the mill company had proceeded with the construction of its mill, but inasmuch as the spur track was necessary for the delivery of the heavy machinery at the mill, the forwarding of the machinery was delayed until the difficulties in the way of the spur track construction were removed. Thereupon the machinery was ordered forward, and the mill construction proceeded, approximately \$300,000 cash having been expended thereon before January 1, 1907. The latter date, it will be

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remembered, was the date for the completion of the mill if the reasonable assurance of the construction of the spur track should be forthcoming in the year 1905. The mill was finally completed in substantial particulars, and operated on April 27, 1907.

The plaintiff alleged, as a breach of the agreement to build the mill, that the work of construction was not commenced in the year 1905; but this was abandoned at the trial. It was also alleged that the mill was not completed and operated by January 1, 1907; and as a further breach it was alleged that the mill was not completed within fourteen months after the reasonable assurance was received that the spur track would be constructed. Judgment was demanded for \$20,000, the amount specified in the agreement as liquidated damages. These allegations were denied. The cause was tried by the court without a jury, and resulted in a judgment for the defendant, from which the plaintiff has appealed.

There can be but little dispute about the most of the facts above stated. The appellant disputes that the mill was fully completed and in operation at the time we have stated. The court found that the respondent did not, during the year 1905, receive reasonable assurance that the railway company would construct its spur track, and that it did not receive such assurance until about June 30, 1906; that notwithstanding the want of such assurance, respondent commenced the construction of its mill plant during the year 1905, and proceeded therewith in good faith; that it was the intent of the agreement concerning the construction of the mill, as appears from its terms and all the facts and circumstances entering into and surrounding its execution, that respondent should have the use and benefit of the spur track in the construction of its mill; that it did not secure such use and benefit until July 26, 1906; that it completed its mill plant and had the same in operation with the capacity required by

the conditions of the agreement, on April 27, 1907, and within fourteen months after receiving from the railway company the reasonable assurance contemplated by the agreement. As one of the conclusions of law, the court found that reasonable assurance, under the particular circumstances of this agreement, is equivalent to positiveness or certainty, which cannot exist until the party assuring has the power and ability to make good such assurance. We think the findings and the facts we have stated in detail are amply sustained by the evidence in the record. The record of the testimony is extensive, and we shall not undertake to discuss it. The conclusions of law and judgment properly follow from the facts. There was a substantial compliance with the terms and spirit of the contract, the benefit of which has been reaped by the appellant; and we believe it manifestly appears from the evidence before us that it would be unjust to now require respondent to pay appellant \$20,000, or any other sum.

The judgment is affirmed.

FULLERTON, RUDKIN, ROOT, and MOUNT, JJ., concur.
DUNBAR and CROW, JJ., took no part.

[No. 7387. Decided June 29, 1908.]

A. E. SUTTON & COMPANY, *Respondents*, v. COAST TRADING COMPANY, *Appellant*.¹

PARTNERSHIP—CONTRACTS—VALIDITY—AUTHORITY TO CONTRACT—FILING CERTIFICATE—STATUTES—VIOLATION—EFFECT. The contracts of a partnership are not invalidated by reason of its failure to file with the county clerk a certificate showing the names of the partners, as required by Laws 1907, p. 288; since the statute does not so provide and contains nothing from which such effect can be inferred, under the strict construction requiring a law in derogation of a common law right to clearly show the intent.

SAME—ACTIONS—RIGHT TO MAINTAIN. Laws 1907, p. 290, § 5, providing that no action shall be maintained by a copartnership without

¹Reported in 96 Pac. 428.

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Citations of Counsel.

alleging and proving the filing of a certificate with the county clerk as required by § 1 to entitle it to do business, is complied with by filing the certificate before suit brought upon a contract; since the contract is not void for failure to make a previous filing.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 7, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Charles Bedford, for appellant, contended, among other things, that, where the statute prohibits the doing of an act, whether a penalty is provided or not, if the language is plain as to prohibition, any attempted contract or business thereunder in violation thereof is void, unless there is a distinct provision therein to the contrary. Mechem, Sales, § 1044 *et seq.*; *Johnson v. Berry* (S. D.), 104 N. W. 1114; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; *Short v. Bullion-Beck & Champion Min. Co.*, 20 Utah 20, 57 Pac. 720, 45 L. R. A. 603; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671, note; *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148, 51 Am. St. 165, 34 L. R. A. 363; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 73 Am. St. 91, 45 L. R. A. 420; *Swords v. Owen*, 43 How. Pr. (N. Y.) 176; *Levison v. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575; *Harris v. Runnels*, 12 How. 80, 13 L. Ed. 38; *Edison General Elec. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. 910, 24 L. R. A. 315; Mechem, Sales, § 1046, and cases cited in note 1; *Patterson v. Byers*, 17 Okl. 633, 89 Pac. 1114; *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N. E. 221; *Cincinnati Mutual Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 36 Am. St. 637, 16 L. R. A. 423, and note; *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989; *Pittsburgh Construction Co. v. West Side Belt R. Co.*, 154 Fed. 929, 11 L. R. A. 1145; *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552.

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T. L. Stiles, for respondents, cited: 23 Am. & Eng. Ency. Law, p. 386; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073; *Edison General Elec. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. 910, 24 L. R. A. 315; *La France Fire Eng. Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Wood v. Erie R. Co.*, 72 N. Y. 196, 28 Am. Rep. 125; *Zimmerman v. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396; *Wolfe v. Joubert*, 45 La. Ann. 1100, 18 South. 806; *Byers v. Bourret*, 64 Cal. 78, 28 Pac. 61; *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444; *Rossmann v. McFarland*, 9 Ohio St. 369; *Patterson v. Byers*, 17 Okl. 633, 89 Pac. 1114.

HADLEY, C. J.—This is an action to recover damages resulting from an alleged breach of contract to deliver two hundred and fifty tons of oats, the damages being fixed in the complaint at \$1,750. The plaintiffs brought the suit as "A. E. Sutton and R. S. Tracy, copartners, under the firm name of A. E. Sutton & Co.," and they allege that the agreement of the defendant to deliver the oats was made with the said copartnership on the 5th day of August, 1907. The answer alleges that the firm name set out in the complaint does not contain the names of all the persons interested therein, and that, when the matters set forth in the complaint occurred, the plaintiffs were not authorized to do business in the state of Washington, for the reason that they had neglected to file in the office of the clerk of the county a certificate showing the true names of all the partners, as provided by statute: that no certificate was filed prior to the 11th day of October, 1907; and that, by reason of the failure to file such certificate prior to the making of the agreement, the contract became invalid and the courts have not jurisdiction to enforce it. This defense was overruled by the court, and after a trial by jury, a verdict was returned for the plaintiffs in the sum of

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\$1,000. Judgment was entered for that sum, and the defendant has appealed.

The only point raised on the appeal is that the court erred in holding that it had jurisdiction to enforce the contract. It is contended that respondents had not complied with the statute as found in the Laws of 1907, pages 288-90, and that the contract was therefore void. For convenience of reference, we here set forth in full §§ 1, 2, and 5 of the act of 1907:

“Section 1. That no person or persons shall hereafter carry on, conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the true and real name or names of the person or persons conducting such business or having an interest therein, unless such person, or all of such persons, conducting said business, or having an interest therein, shall file a certificate in the office of the county clerk of the county or counties in which said business is to be conducted, which certificate shall set forth the designation, name or style under which said business is to be conducted, and the true and real name or names of the party or parties conducting, or intending to conduct, the same, or having an interest therein, together with the postoffice address or addresses of said person or persons. Such certificate shall be executed and acknowledged by the party or parties conducting, or intending to conduct, said business, or having an interest therein, before an officer authorized to take acknowledgment of deeds.”

“Sec. 2. Any person or persons now conducting any business under such assumed name, or under any designation, name or style other than the true and real name or names of all of the parties having an interest therein, shall file a certificate as provided for in section one hereof within thirty days after this act shall take effect, and persons hereafter conducting, or intending to conduct, any business, as set forth in section one above, shall, before commencing business, file such certificate in the manner hereinbefore prescribed.”

“Sec. 5. No person or persons carrying on, conducting or transacting business as aforesaid, or having an interest

therein, shall hereafter be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in section one hereof, and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit."

Appellant contends that the effect of the statute is to make unlawful any contract entered into by a partnership designated by other than the real names of the persons interested therein, if said contract is made before filing the certificate mentioned in § 1. It will be observed that the section does not in terms declare that such contracts shall be unlawful or void. The title of the act is as follows:

"An act providing that when any business, other than a corporation or a limited partnership, is conducted under an assumed name, a certificate showing the real parties in interest shall be filed with the county clerk, and fixing a penalty."

It will be seen that when the title was drawn it was the evident intention to provide a penalty for violating the terms of the act, but no penal provision is found in the body thereof. Section 5 prevents the maintenance of a suit by such a partnership without the allegation and proof that a certificate has been filed, as provided by § 1. The trial court held that the filing of the certificate before the beginning of the suit, as was done in this case, was a compliance with § 5, and entitled respondents to maintain the suit. Section 5 says the certificate shall be filed as provided for in § 1. Reference to § 1 shows only the substance of what the certificate shall contain. No time limit is mentioned in that section for the filing of the certificate. It is true, § 2 does provide that partnerships existing when the law took effect should file certificates within thirty days thereafter, and that others should file before commencing business; but no reference is made to the terms of that section in § 5. Ordinarily statutes of this character provide for a penalty, or in express terms declare that a violation of them shall render contracts unlawful and

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void. This statute does neither. The courts endeavor to discover the real intent of the legislature, but inasmuch as such statutes affect the common law right to contract, a strict construction is applied and implications against the common law privilege to contract are not favored. The gist of the statute before us is that certain partnerships shall file certificates with the clerk of the county, and we are to determine what effect the failure to do so has upon contracts actually made. Appellant's argument proceeds upon the theory that the filing of a certificate is an act conferring the power to make a contract, but we think it is rather a regulation of the exercise of the power to contract already existing under the common law. This state recognizes the right of foreign corporations to do business here upon compliance with certain conditions required by statute in the way of filing a certified copy of the charter and the appointment of an agent; but it has been repeatedly held that the failure to comply does not render contracts void when actually made, in the absence of positive legislative declaration to that effect. In *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327, this court said:

"Our statutes recognize the right of foreign corporations to do business here, and while it is stated that they are so authorized by a compliance with the conditions prescribed in the statutes relating to the filing of a certified copy of the charter and the appointment of an agent, it is nowhere declared that contracts entered into by such corporations in case the statutes have not been complied with are void, and it is provided that any agent of any foreign corporation conducting or carrying on business within the limits of this state for and in the name of such corporation contrary to any of the provisions of the statutes shall be deemed guilty of a misdemeanor, and shall upon conviction be punished therefor by a fine or imprisonment, or both. See Gen. Stat., §§ 1524-31. The purpose of these statutes requiring foreign corporations to file certified copies of their charters, and constitute and appoint an agent who shall reside in the state at the principal place of business of the corporation, is to protect parties

dealing with them from being imposed upon, and to provide means of obtaining service upon them in the courts of the state. And they were not enacted for the purpose of rendering the contracts of such corporations which have not complied with the statutes void, and this result should not follow unless the legislature has expressly declared that such contracts shall be unlawful."

See, also, *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073; *Edison General Elec. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. 910, 24 L. R. A. 315; *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827.

The right of foreign corporations to do business in this state is by the grace of the state, and not by a common law right, as in the case of partnerships. If, therefore, the contracts of such corporations are not invalidated by mere failure to comply with the state statute, for a stronger reason it would seem that the contracts of partnerships should not be held to be unlawful for failure to file a certificate under the statute in question, unless the legislative intent to make them void were clear and positive. Discussing the general construction of statutes of this character in *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 38, the supreme court of the United States observed as follows:

"Such we believe to be now the rule in England, but with many exceptions, made upon distinctions very difficult to be understood consistently with the rule; so much so, that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it

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were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes *unlawful*, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it when the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

Applying the above argument to the statute in question, we think it cannot be said that the legislative intent to make contracts in contravention of the statute void is clear. It may have been the intention to make the mere act of violation an unlawful one, the penalty therefor having been inadvertently overlooked; but it certainly is not clear that the contracts themselves made in contravention of the statute are void and unenforceable. The argument in the last cited case closes as follows: "When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void." This statute is not silent as to the effect of noncompliance, but it contains a provision in § 5 for barring actions upon the contracts until certificates are filed. Such is the only clearly defined result to follow from a violation of the act. We therefore believe with the trial court that, under the peculiar terms of this statute, the filing of the certificate before making the contract was not necessary to give validity to the contract, and that the filing before bringing the suit entitled respondents to maintain the action. Such was the holding in California under a similar statute. *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444; *Byers v. Bourret*, 64 Cal. 73, 28 Pac. 61.

The judgment is therefore affirmed.

FULLERTON, RUDKIN, MOUNT, and Root, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7320. Decided June 15, 1908.]

NETTIE E. BURLING, Respondent, v. T. D. PAGE et al., Appellants.¹

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 30, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enforce a trust in real property. Affirmed.

T. D. Page, for appellants.

Elias A. Wright and F. C. Kapp, for respondent.

DUNBAR, J.—This action was brought by the respondent against the appellants, to enforce a resulting or constructive trust in lots 3 and 4, in block 4, of Craven's addition to Green Lake, in King county, Washington. The respondent alleges in brief, that on the 20th day of March, 1906, acting through the appellant T. D. Page, her attorney, she purchased the above described property for the sum of \$660; that she furnished said Page the sum of \$660 and instructed him to pay the same to O. E. Elliot and Dora Elliot, the grantors, and to procure from them a deed to the respondent of said property; that said Page paid the said sum of \$660 to said Elliot and wife, but that, acting in disregard of her instructions, he fraudulently procured a conveyance of said real property from said Elliot and wife to himself, without the knowledge or consent of respondent, and that upon this fact coming to the knowledge of the respondent, she immediately demanded of appellants that they convey said real property to her, which they refused to do. Under these allegations the respondent prayed for a decree, adjudging that the appellants held the legal title to said real property in trust for respondent, and for a conveyance by appellants to respondent of the said real property.

Appellants in their amended answer admitted that, at the time stated in the complaint, the appellant T. D. Page was attorney for the respondent, and that the appellants were husband and wife; denied each and every other allegation in the complaint, and set up by way of cross-complaint an affirmative defense that the appellant T. D. Page purchased said real property with money that he had theretofore borrowed from respondent; that he had thereafter executed and delivered to respondent his promissory note covering the said \$660, and other moneys which he had borrowed from respondent; that the respondent held in her possession said promissory note covering said loans; that the respondent knew at the time of the purchase of said real property that appellant T. D. Page was purchasing the same for the use and benefit of himself and wife; that

¹Reported in 96 Pac. 155.

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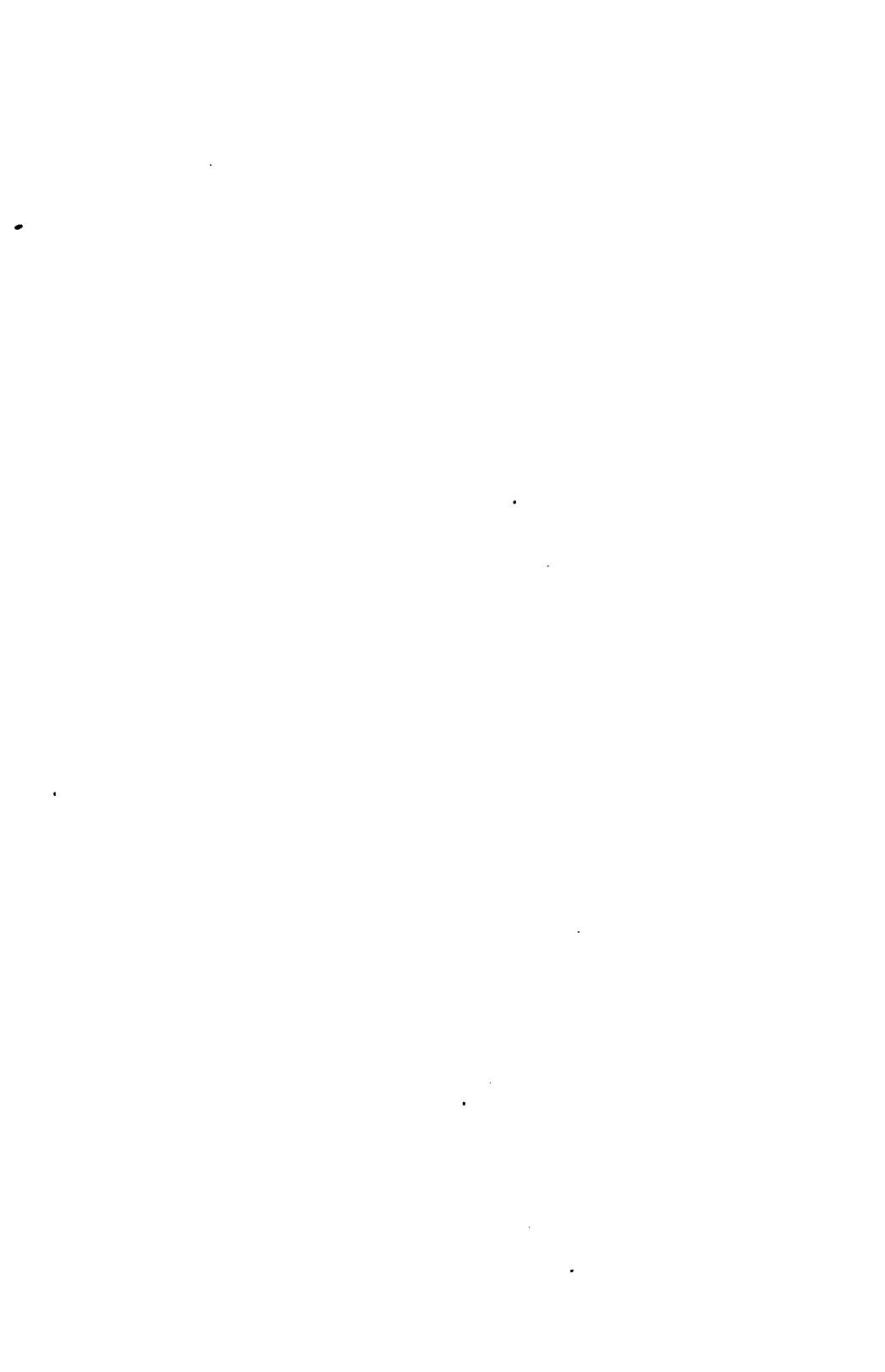
Opinion Per DUNBAR, J.

the respondent held the legal title to the real property in the Electric Motor Line Addition to the city of Seattle, in which appellants owned a half interest as security for said loans made by respondent to appellant T. D. Page; avers that respondent never at any time had any interest whatever in the real property described in the complaint. Various other affirmative defenses were pleaded, but they did not arise out of the transactions set forth in the complaint, nor were they in any way connected with such transactions, and the court properly sustained a demurrer to said defenses. Upon the issues raised by the complaint, the direct answer, the affirmative defense above set forth, and the reply to said affirmative defense, the cause was tried, and it was adjudged and decreed that appellants held the legal title to the land described in the complaint in trust for the respondent, and that the same should be reconveyed, etc.; also that the respondent should return the note covering the \$660 and certain other moneys to the appellants.

An examination of the testimony in this case convinces us that the judgment of the trial court is correct. It is therefore affirmed.

MOUNT, CROW, and RUDKIN, JJ., concur.

HADLEY C. J. and FULLERTON, J., took no part.



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4. **SAME—LOST CORNERS.** Where a quarter corner is lost, it must be located half way between the section corners. *Heybrook v. Index Lumber Co.*

BOUNDARIES—CONTINUED.

5. **BOUNDARIES—ASCERTAINMENT—EVIDENCE—SUFFICIENCY.** There is sufficient evidence of the location of a disputed boundary line, the starting point of which was given as the center of F. street in a town plat, 823.5 feet north of a certain government corner, where it appears that the center of F. street is 823.5 feet north of the center of S. street, as given by the plat, the accuracy of the plat not being disputed, and that the government stake originally stood in the center of S. street, although it has long since disappeared. *Stokes v. Curtis* 235
6. **SAME—DESCRIPTION—CALLS—DISCREPANCIES.** Where a description first calls for the north boundary of the tract as at the center of a street, and runs thence south a certain number of feet to a railroad right of way for the south boundary, the first call prevails over the last call in determining the location of the north boundary, where there is a shortage between the two boundaries. *Stokes v. Curtis* 235

BREACH:

- Of contract of sale, see SALES, 3, 4, 6.
Of contract to convey land, see VENDOR AND PURCHASER, 9-11.

BRIEFS:

- Assignment of errors in, see APPEAL AND ERROR, 16.

BROKERS:

- Specific performance of agent's contract to convey land, see SPECIFIC PERFORMANCE, 1.
Authority to make binding contract to sell land, see VENDOR AND PURCHASER, 2.

1. **BROKERS—AUTHORITY—AGENT FOR OWNER—ACTING IN OWN INTEREST—VENDOR AND PURCHASER—CONTRACT.** A real estate broker acting pursuant to authority initiated by his letter to the owner stating "I can sell your lot," and asking the best price, is a selling agent only, without authority to make a binding contract of sale, upon receipt of a letter from the owner stating that she will take a certain sum net, where the owner had no notice that the broker was attempting to purchase in his own interest. *Foss Investment Co. v. Ater* 446
2. **SAME.** A sale of real estate is voidable at the option of the owner, where the broker was acting as selling agent for a nonresident owner, and knew that the property was rapidly increasing in value, but failed to communicate that fact to the owner, and made a sale for his own practical benefit to a corporation controlled and owned by him, without the knowledge of the owner that the agent was interested in the sale. *Foss Investment Co. v. Ater* 446

BUILDINGS:

Construction and performance of building contract, see CONTRACTS, 5-7.

Affected by mechanics' liens, see MECHANICS' LIENS.

BURDEN OF PROOF:

To show violation of interstate commerce law, see COMMERCE, 3.

CALLS:

In deeds, see BOUNDARIES, 1, 3, 6.

CANALS:

Construction by counties, sufficiency of title of act, see STATUTES, 5.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see CONTRACTS, 4.

Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Rescission of sale of personality, see SALES, 1.

Rescission of contract of sale of land, see VENDOR AND PURCHASER, 4.

1. CANCELLATION OF INSTRUMENTS—COMPETENCY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the cancellation of a deed on the ground of incompetency of the grantor, about seventy-three years of age, and because of undue influence, where it appears that the property, valued at \$600, was deeded in consideration of an agreement by the grantee to pay \$50 per year as long as the grantor lived, which was paid for nine years without complaint made by the grantor or any of her children with whom she lived most of the time, and she appears to have been competent to transact business and no advantage was taken of her. *Goodrich v. Kimble*..... 516
2. CANCELLATION OF INSTRUMENTS—UNDUE INFLUENCE AND INCOMPETENCY—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain findings and a decree refusing to cancel a deed from a father to a son on the ground of undue influence and incompetency, where it appears that the grantor, who was over eighty years of age, had trouble with his wife and stepdaughter and feared they would obtain the property conveyed, that he had given considerable to another son, and still retained considerable property, that he had stated that he intended to deed the property to his son and afterwards expressed satisfaction therewith, and the charges as to misrepresentation, undue influence and incompetency were overcome by the evidence. *Florin v. Florin*..... 37
3. CANCELLATION OF INSTRUMENTS—GROUNDS—FRAUD—INCAPACITY—RELIEF GRANTED—ACCOUNTING. A feeble-minded mother and son, the owners of real and personal property, are entitled to the cancellation of leases of the property given by them for the term of twenty-five years in consideration of nominal annual payments, ob-

CANCELLATION OF INSTRUMENTS—CONTINUED.

tained by the lessee by working upon their fears and by agreeing to keep the son out of an insane asylum and to support the mother during life, which support lessee failed to furnish; and, also, to an accounting for rents received from a subtenant, and for personal property obtained by the lessee without consideration. *Collins v. Seyfang* 554

CARRIERS:

Discrimination in freight charges violating interstate commerce law, see COMMERCE.

Excessive damages for injuries to passengers, see DAMAGES, 5-7.

Injuries to trespassers or licensees on train, see RAILROADS, 2.

1. CARRIERS—DELIVERY—LIABILITY FOR GOODS DESTROYED—TERMINATION OF RELATIONS—EVIDENCE—SUFFICIENCY. A consignee had a reasonable opportunity to remove its goods, and the railroad company is, therefore, not liable as a common carrier for their loss, where it appears that the consignee in the forenoon called for beer containers, that had been received during the previous four days, and was told that the bills would be ready and it could have the goods at any time after noon of that day, that the consignee's place of business was only four hundred feet from the warehouse where the goods were stored, and it had its own drays, but did not call that afternoon, because not suiting its convenience to do so, and without fault of the carrier, the warehouse and goods were destroyed by fire that night. *North Yakima Brewing & Malting Co. v. Northern Pac. R. Co.* 375
2. CARRIERS—CARRIAGE OF GOODS—STORAGE—LOSS PENDING DELIVERY—LIABILITY—WAREHOUSEMEN. A railroad company is liable, as a carrier, for goods unloaded into its warehouse and destroyed by fire, where it appears that the consignee appeared for the goods at noon on the day of their arrival, but was informed that they could probably not be delivered until the way bills were made out the next day, and they were destroyed by fire that night; since the carrier's liability does not become that of a warehouseman until the consignee has had a reasonable opportunity to remove the goods. *Fisher v. Northern Pac. R. Co.* 258
3. CARRIERS—WHO ARE PASSENGERS. A person crossing a railroad track to reach a platform with the intention of taking a train, is not a passenger, although no tickets are sold at that station and fares were to be paid on the train. *Gregg v. Northern Pac. R. Co.* 183
4. CARRIERS—PASSENGERS—SETTING DOWN PASSENGERS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a finding that a street car step was defective, where the plaintiff, a woman weighing 250 pounds, testified that it sagged down when she stepped upon it, and caught and held the heel of her shoe. *McCormick v. Seattle Electric Co.* 652

CARRIERS—CONTINUED.

5. SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—COMPARATIVE NEGLIGENCE. In an action by a passenger for personal injuries sustained in alighting from a street car, it is proper to instruct that the plaintiff is not required to be absolutely free from any neglect whatever, that that would require extraordinary care, the exercise of ordinary care being sufficient, and that plaintiff may exercise ordinary care although “guilty of slight neglect in the broadest sense of the term”; and the same does not indorse the doctrine of “comparative” negligence. *McCormick v. Seattle Electric Co.*..... 652
6. CARRIERS—PASSENGERS—SETTING DOWN PASSENGERS—CONTRIBUTORY NEGLIGENCE. Where a conductor on a street car, in response to a passenger’s request to stop at a certain street, closed one gate, gave the signal to stop, and opened another gate, and the car slowed up and came to the point of stopping, the passenger is not negligent in attempting to alight while the car is in motion, although there was no platform on the side of the open gate; and the company is negligent in suddenly starting up the car before the passenger is safely off. *Marbourg v. Seattle, Renton & Southern R. Co.*..... 51
7. SAME—CONTRIBUTORY NEGLIGENCE—CROSSING ROADS. The fact that one is a passenger does not relieve him from the consequences of contributory negligence in crossing a track in front of a moving train without stopping to look or listen. *Gregg v. Northern Pac. R. Co.* 183
8. CARRIERS—PASSENGERS—TICKETS—RELIANCE UPON—WRONGFUL EJECTION—MISTAKE. A passenger has a right to rely on transportation sold to him by the proper agent, without reading or examining the same, and if ejected from the train through the mistake of the agent without negligence on his part, he may recover therefor. *Olson v. Northern Pac. R. Co.*..... 626
9. SAME—NEGLIGENCE IN PURCHASING TICKET—EVIDENCE—QUESTION FOR JURY. Whether a passenger was guilty of negligence in purchasing a ticket is for the jury, where it appears that he was notified that he must obtain a permit of the agent to travel by freight train, that he applied therefor to the agent, signed for it, paid his fare, and he testified that he received only a permit, which he supposed was a ticket and tendered as such, and he was corroborated by one witness to the point that no ticket was issued, although there was evidence to the contrary, and that he left his ticket at the window of the office. *Olson v. Northern Pac. R. Co.*..... 626
10. SAME—EJECTION—EXCESSIVE DAMAGES. A verdict for \$800 for the wrongful ejection of a passenger from a freight train, is so excessive as to show that it was the result of passion or prejudice, requiring a new trial, where the plaintiff was a man of mature years, there was no financial loss or injury to the person, and only

CARRIERS—CONTINUED.

two or three other passengers on the train, to whom it was apparent that there had been merely a mistake of some kind as to the ticket not reflecting on the plaintiff. *Olson v. Northern Pac. R. Co.*..... 626

CERTIFICATE:

Failure of partnership to file as invalidating contracts, see **PARTNERSHIP**, 2, 8. .

CERTIORARI:

Review of condemnation proceedings, see **EMINENT DOMAIN**, 2.

1. **CERTIORARI—REMEDY BY APPEAL—FORCIBLE ENTRY AND DETAINER—APPEAL—SUPERSEDAES.** There is an adequate remedy by appeal and therefore certiorari will not lie to review an order in an action of unlawful detainer, quashing a writ of restitution for insufficiency of the notice set out in the complaint; since the plaintiff may stand upon the notice and forthwith appeal from the final judgment, securing a supersedeas and review of the order; or may amend the complaint and secure another writ. *State ex rel. Wilkeson Coal & Coke Co. v. Superior Court*..... 203

CESSATION OF CONTROVERSY:

As ground for dismissal of appeal, see **APPEAL AND ERROR**, 6.

CHARACTER:

Of accused as evidence, see **CRIMINAL LAW**, 1, 2.

CHARGE:

To jury in civil actions, see **TRIAL**, 9-15.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CITIZENS:

Privileges and immunities, see **CONSTITUTIONAL LAW**.

CLAIMS:

Notice of claim for materials furnished contractor, see **BONDS**.
Indemnity against claims for materials used or furnished, claims allowed, see **MECHANICS' LIENS**.

CLAMS:

Ownership of on leased tide lands, see **PUBLIC LANDS**, 2.

CLASS LEGISLATION:

See **CONSTITUTIONAL LAW**.

COLLATERAL ATTACK:

On appointment of deputy engineer, see COUNTIES, 3.
Necessity for taking land for county road, see HIGHWAYS, 3.
On judgment, see JUDGMENT, 7.
On condemnation proceedings for local improvement, see MUNICIPAL CORPORATIONS, 18, 19.

COLLATERAL SECURITY:

See PLEDGES.

COLLUSION:

In establishment of highway, see HIGHWAYS, 2.

COMBINATIONS:

By competing gas companies, rights of minority stockholders, see CORPORATIONS, 2, 5, 6.

COMMENT:

By judge on facts or evidence, see TRIAL, 2, 3, 8.

COMMERCE:

1. COMMERCE—REGULATIONS—DISCRIMINATIONS—FOREIGN TRAFFIC—CARRIERS. The interstate commerce law, 34 Stat. L. p. 584, requiring the posting and publishing of freight rates and charges applies to shipments from a foreign country to be carried from the port of entry to any place in the United States. *Fisher v. Great Northern R. Co.*..... 205
2. SAME—DISCRIMINATORY CHARGES—AGREEMENTS VIOLATING SCHEDULE. When a freight rate has been fixed and properly posted and published by a carrier with reference to shipments regulated by the interstate commerce law, such rate controls the carrier's charges and lien without regard to a lesser rate agreed to by the carrier, as the latter would be unlawful and unenforceable. *Fisher v. Great Northern R. Co.*..... 205
3. SAME—BURDEN OF PROOF. The burden is upon the carrier to show that its shipping contract, fixing a lesser rate than its published schedule, violates the interstate commerce law and is unenforceable, where the carrier asserts the invalidity of the contract and seeks to enforce the higher rate. *Fisher v. Great Northern R. Co.*..... 205
4. COMMERCE—REGULATIONS—DISCRIMINATION—AGREEMENT IN VIOLATION OF INTERSTATE COMMERCE LAW—OCEANIC COMPETITION. Where a railroad's published schedule of rates and charges, posted pursuant to the interstate commerce law, fixed a rate of eighty-five cents per hundred pounds on canned goods from the port of S. in Norway to a station in this state, providing that the ocean rate procurable is such as to allow a minimum rate of seventy-five cents per hundred pounds for rail carriage from Atlantic seaboard ports, and provided further that, if the difference between the through rate and

COMMERCE—CONTINUED.

- the rail line's minimum of seventy-five cents was less than the ocean proportion, the through rate will be the ocean proportion plus seventy-five cents per hundred pounds, an agreement by the carrier to make the through shipment at the rate of eighty-five cents per hundred pounds is not necessarily in violation of the interstate commerce law, although the best ocean rate procurable at the time was thirty-eight and seven-tenths cents per hundred pounds; and the same may be enforced against the carrier, in the absence of any evidence on its part showing that circumstances and conditions attending oceanic competition did not justify the lesser rate agreed upon; since the burden is upon the carrier to show that the agreed rate is unlawful, and since the rate from the port of entry to the point of destination may lawfully be less in the case of such oceanic competition than it is where the shipment originates in the United States; there being a distinction between such foreign and inland shipments in the application of the interstate commerce law. *Fisher v. Great Northern R. Co.*..... 205
5. **COMMERCE—INTERSTATE REGULATIONS—VIOLATIONS—AGREEMENT VIOLATING SCHEDULE—CARRIERS.** Where connecting railroads had published, pursuant to the interstate commerce act, a schedule of joint rates on shipments of freight cars on their own wheels, which specified \$150 for empty cars from St. Louis to Spokane, and if loaded with freight to the account of the carrier, \$90 per car in addition to the freight earned, in case of shipments from Missouri river terminals and Port Arthur, Ont., a contract by part of such railroads having lines from Kansas City to Spokane whereby they agreed to ship loaded cars from St. Louis or Kansas City to Spokane free of charge in consideration of the use of the same for carriage of freight, is void, under the interstate commerce law prohibiting agreements at variance with the rates prescribed in the schedule, and the scheduled rate may be collected; and it would be immaterial that the connecting line shipped the cars from St. Louis to Kansas City, loaded, and received the benefit of the freights earned between those points, the contracting carriers having no line from St. Louis to Kansas City. *Coeur d'Alene & Spokane R. Co. v. Union Pac. R. Co.*..... 244
6. **SAME—CONTRACTS—CONSTRUCTION.** A schedule specifying a rate of \$90 per car for the shipment of cars from Missouri river points to Spokane on their own wheels, if loaded, in addition to the freight earned, is violated by a carriage under an agreement to ship free of charge in consideration of the use of the cars for the carriage of freight, although the cars were not loaded with through freight to the point of destination, but were used in loading and reloading along the way and to Seattle and other points beyond and not on the route, and were not returned to the point of destination for from

COMMERCE—CONTINUED.

three to six months; since there was nothing to show the intention of the parties to the contract that a use should be made of the cars not contemplated by the schedule; and since in civil proceedings the scheduled rates must control where it is not clear that the conditions are dissimilar. *Coeur d'Alene & Spokane R. Co. v. Union Pac. R. Co.*..... 244

COMMISSIONERS:

Of court, see COURT COMMISSIONERS.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

Estoppel by separation agreement and laches to assert title to, see ESTOPPEL.

In general, see HUSBAND AND WIFE.

COMPARATIVE NEGLIGENCE:

See CARRIERS, 5.

COMPENSATION:

Of attorney, see ATTORNEY AND CLIENT, 2.

For extras in performance of building contract, see CONTRACTS, 5, 6.

Of corporate officer or agent, see CORPORATIONS, 8.

Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.

For use of money, see INTEREST.

COMPETENCY:

Of evidence in civil actions, see EVIDENCE, 3.

Of witnesses in general, see WITNESSES, 1.

COMPROMISE AND SETTLEMENT:

Authority of party to settle action without consent of attorney, see ATTORNEY AND CLIENT, 1.

Admissibility of effort to compromise, see EVIDENCE, 4.

Enjoining city officers from compromising judgment, relief and form of judgment, see INJUNCTION, 2.

Settlement of claims as defense in action on indemnity contract, see MECHANICS' LIENS, 4.

Right of council to compromise claim in favor of town, see MUNICIPAL CORPORATIONS, 36.

1. **COMPROMISE AND SETTLEMENT—CONTRACT—CONSIDERATION.** An agreement or compromise fixing the rights of several parties in the future use of the waters of a spring is supported by a sufficient consideration where the parties seeking to enforce the contract had

COMPROMISE AND SETTLEMENT—CONTINUED.

previously claimed in good faith as riparian owners and appropriators of a specified portion of the water, and the compromise recites such claim and that the same is superior to the claim of the other party to the contract. *Hutchinson v. Mt. Vernon Water and Power Co.* 469

COMPUTATION:

Of interest, see INTEREST.

CONCLUSION:

Of witness, see EVIDENCE, 7.

CONDEMNATION:

Taking property for public use, see EMINENT DOMAIN.

CONDITIONS:

Precedent to action by corporation, payment of license fee, see CORPORATIONS, 1.

Maintenance by railroad of safety device as condition to crossing prior railroad right of way, see EMINENT DOMAIN, 1.

Conditional delivery of deed, see ESCROWS.

In lease, see LANDLORD AND TENANT, 1, 2.

In proposals for bids as affecting proceedings for local improvement, see MUNICIPAL CORPORATIONS, 6, 7.

In petition for local improvement, effect on jurisdiction, see MUNICIPAL CORPORATIONS, 5.

Subsequent to forfeiture of grant of railway right of way, see PUBLIC LANDS, 1.

Precedent to attack on tax title, see TAXATION, 8.

Precedent to action by vendee for breach of contract, see VENDOR AND PURCHASER, 10.

Precedent to action by vendor to rescind contract for sale of land, see VENDOR AND PURCHASER, 4.

CONDUCT OF COUNSEL:

Of counsel in civil actions, see TRIAL, 5, 6.

CONSIDERATION:

For compromise and settlement, see COMPROMISE AND SETTLEMENT.

For execution of bond, see INDEMNITY, 2.

CONSTITUTIONAL LAW:

Appointment of court commissioners, see COURT COMMISSIONERS, 1.

Release of criminal insane, see INSANE PERSONS, 3, 4.

Confinement of criminal acquitted because of insanity, see INSANE PERSONS.

Forfeiture and penalty for wrongful sale of liquor, see INTOXICATING LIQUORS, 4, 5.

CONSTITUTIONAL LAW—CONTINUED.

- Qualification of judges, see JUDGES.
- Limitation on power of municipality to incur indebtedness, see MUNICIPAL CORPORATIONS, 32.
- Subjects and titles of statutes, see STATUTES, 3-6.
1. CONSTITUTIONAL LAW—JUDICIAL POWER. The courts are bound to apply the law as made by the legislature, without putting humanitarian considerations above it. *Kelly v. Cowan*..... 606
 2. CONSTITUTIONAL LAW—CLASS LEGISLATION—MORTGAGES—POSSESSION DURING REDEMPTION. Laws 1899, p. 94, §15, providing that mortgaged premises occupied as a homestead by the mortgagors shall remain in their possession during the period of redemption is not unconstitutional as granting special privileges to any class of citizens. *North Pacific Loan and Trust Co. v. Bennett*..... 34
 3. CONSTITUTIONAL LAW—CLASS LEGISLATION—SUNDAY—PROHIBITION OF AMUSEMENTS—POLICE POWER. Bal. Code, § 7250, prohibiting the keeping open of any theater on Sunday is not unconstitutional as unreasonable, arbitrary or unnecessary for the protection of public health, safety or morals, or objectionable as class legislation, but is valid as an appropriate exercise of the police power. *In re Donnellan* 460

CONSTRUCTION:

- Of contract of carriage, see COMMERCE, 6.
- Of contracts, see CONTRACTS, 2, 3, 7.
- Statutory provision for township organization, majority vote, see ELECTIONS.
- Of contract of warranty, see SALES, 3, 4.
- Usurious contract, see USURY.

CONTINGENT FEES:

See ATTORNEY AND CLIENT, 1.

CONTINUANCE:

1. CONTINUANCE—GROUNDS—ABSENCE OF WITNESSES—NECESSITY OF SHOWING. It is not error to refuse a continuance to defendant asked for at 4:30 o'clock until the next day, in order to meet evidence of the plaintiff on reopening the case for the purpose of introducing evidence not proper in rebuttal, where the defendants failed to make any showing pursuant to Bal. Code, § 4977, as suggested by the court at the time, but merely stated that their witnesses had been excused and it would be necessary to hunt them up and consult with them. *Gauthier v. Wood & Iverson*..... 8

CONTINUATION:

Original bill as continuation of prior law, see STATUTES, 2.

CONTRACTORS:

Performance of contract and lien for extra work, see CONTRACTS, 5, 6.
Right to lien for getting-out logs, see LOGS AND LOGGING, 1, 3.

CONTRACTS:

Joinder of causes of action upon separate contracts, see ACTION.
Authority of broker to make contract of sale, see BROKERS.
Agreements for carriage of goods in violation of interstate commerce law, see COMMERCE.
Compromise, see COMPROMISE AND SETTLEMENT.
Of contracts between officers and corporations, see CORPORATIONS, 5-7.
Rescission for fraud in sale of corporate stock, see CORPORATIONS, 3, 4.
Nominal or substantial damages, see DAMAGES, 1.
Admission of parol or extrinsic evidence, see EVIDENCE, 6.
Agreements within statute of frauds, see FRAUDS, STATUTE OF, 2.
Of indemnity, see INDEMNITY.
Right to cease work upon refusal to make payments, see LOGS AND LOGGING, 5.
Construction of contract of indemnity, see MECHANICS' LIENS.
For public improvements, see MUNICIPAL CORPORATIONS, 2, 6, 7.
Partnership contract, see PARTNERSHIP, 1, 2.
Sales of personality, see SALES.
Specific performance, see SPECIFIC PERFORMANCE.
Operation and effect of usury laws, see USURY.
Sale of land, see VENDOR AND PURCHASER.

1. CONTRACTS—VALIDITY—EXECUTION—FRAUD—ESTOPPEL—LACHES. Negligence and laches in signing his name to a contract does not estop a party from asserting its invalidity by reason of trickery and fraud in securing his signature without his intent to sign a contract or knowledge that he was doing so. *Loveland v. Jenkins-Boys Co.* 369
2. CONTRACT—ENTIRE AND DIVISIBLE. A written contract for the sale of mining claims and shares of stock for a lump sum is an indivisible one. *Brechlin v. Night Hawk Mining Co.* 198
3. CONTRACTS—FORFEITURE—CONSTRUCTION. In an action to enforce a contract, a clause of which provided that the plaintiffs' rights should remain the same in case of forfeiture by the defendant, the question of forfeiture is immaterial. *Hutchinson v. Mt. Vernon Water and Power Co.* 469
4. CONTRACTS—SALES—RESCISSON—MUTUAL MISTAKE—RELIEF—INJUNCTION—DAMAGES. Where a sale of standing timber was made upon the basis of a cruise by one Y. at one dollar per thousand feet, and after part of the same was removed, Y. discovered that he had made a mistake in the boundary lines, thereby omitting a large quantity of the timber, and notified the purchasers to make good therefor to the vendor, which they refused to do, the vendor is entitled to an injunction restraining further removal of the timber and for damages for the timber taken. *Northcraft v. Blumauer* 588

CONTRACTS—CONTINUED.

5. **CONTRACTS — PERFORMANCE — OPTIONAL CONTRACT — APPROVAL OF ARCHITECT — ARBITRARY ACTION — EXTRAS.** Where a building contract provides that the work must be performed to the satisfaction of the architect, he represents the owner as agent, and the contractor may treat the architect's arbitrary direction to use a certain class of material, as to which the contract gives the contractor an option, as a direction by the owner to disregard the contract, for which work extra compensation may be recovered, if extra costs result to the contractor therefrom. *Camp v. Neufelder*..... 426
6. **SAME—REMEDIES OF CONTRACTOR—LIENS FOR EXTRAS—MECHANICS' LIENS.** In such a case, it is not a valid objection to a claim for a lien for the extra compensation that the same was waived by complying with the direction of the architect, as the contractor may pursue either the remedy of a lien for the extra work, or refuse to comply with the direction and recover on the contract. *Camp v. Neufelder* 426
7. **SAME—CONSTRUCTION OF CONTRACT.** Where a building contract provides that certain sidewalk lights shall be "the W. B. J. make, or equal" it gives the contractor an option; and the arbitrary action of the architect in insisting that no other make was equal, and refusing to allow an "equal" make to be used, cannot be justified by a clause providing that the contract shall be performed to the satisfaction of the architect. *Camp v. Neufelder*..... 426

CONTRIBUTORY NEGLIGENCE:

- Of passenger injured by operation of street or railway cars, see **CARRIERS**, 5-7.
- Of servant, see **MASTER AND SERVANT**, 8, 9, 11, 12, 15, 16.
- Of person injured through defect or obstructions in street, see **MUNICIPAL CORPORATIONS**, 28.
- Negligence of patient as bar to recovery for malpractice, see **PHYSICIANS AND SURGEONS**, 3, 4.
- Of person killed on or near railway track, see **RAILROADS**, 3, 4.

CONVEYANCES:

- Description of boundaries, see **BOUNDARIES**, 1, 6.
- In escrow, see **ESCROWS**.
- In fraud of creditors, see **FRAUDULENT CONVEYANCES**.
- By husband or wife, see **HUSBAND AND WIFE**, 1, 2.
- As security for debt, see **MORTGAGES**.

CORNERS:

- Location of, see **BOUNDARIES**, 3, 4.

CORPORATIONS:

- Sufficiency of railway stock subscription as condition precedent to condemn land, see **EMINENT DOMAIN**, 3.

CORPORATIONS—CONTINUED.

Assignment of claim to bank as fraud on creditors, see **FRAUDULENT CONVEYANCES**.

Municipalities, see **MUNICIPAL CORPORATIONS**.

Ratification by subscriber to stock of trust company in unauthorized investment of funds in bank, see **PRINCIPAL AND AGENT**.

Right to quiet title to property omitted in transfer of partnership real estate to corporation, see **QUIETING TITLE**, 1.

Venue of action against, consent of codefendant, see **VENUE**.

Water companies, see **WATERS AND WATER COURSES**.

1. **CORPORATIONS—ACTIONS—LICENSE FEES—STATUTES—RETROACTIVE EFFECT.** Laws 1907, p. 271, requiring that the payment of an annual license fee by a corporation be alleged and proved in order to maintain an action in the courts of this state, is not retroactive, and does not affect actions previously commenced. *Exposition Amusement Co. v. Empire State Surety Co.*..... 637
2. **CORPORATIONS—GAS—FRANCHISES—COMBINATIONS—CONSTRUCTION—IMPLIED REPEAL.** An ordinance granting a franchise to a gas company, which forbids any combination with any competitor under penalty of forfeiture of the franchise, is, as to such penalty, impliedly repealed by a later ordinance granting a franchise to another gas company expressly authorizing a combination with the old company. *Theis v. Spokane Falls Gas Light Co.*..... 477
3. **CORPORATIONS—STOCK—SALES—RESCISSON—FRAUD—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to warrant the rescission of a sale of stock for fraudulent representations, where it appears that plaintiff had agreed to purchase stock in a mill company as a condition of securing employment, and the representations of the officers of the company complained of related to matters of opinion as to the value of stock, for which plaintiff paid \$500 for stock of the par value of \$2,000, such fact showing that the stock was not at par and being sufficient to put him on inquiry; and the purchaser being an experienced millman who made an inspection of the mill and was competent to estimate its value; and where plaintiff chiefly relied upon representations as to skid roads and buildings on the property of the company, when those matters did not occasion the loss. *Sather v. Home Security Savings Bank.*..... 672
4. **SAME—TRANSFER OF STOCK.** Money paid for stock sold and assigned cannot be recovered on the ground that the deal was not consummated because the stock was not transferred on the books of the company, where there was no obligation to get the stock so transferred; the stock belonging to the purchaser as soon as paid for. *Sather v. Home Security Savings Bank.*..... 672
5. **SAME—REPRESENTATION—ACTS ULTRA VIRES—COMBINATIONS—STOCKHOLDERS—RIGHTS OF MINORITY.** Minority stockholders of a gas company having a franchise to manufacture and sell gas to con-

CORPORATIONS—CONTINUED.

- sumers cannot object that the action of the officers and majority stockholders in entering into an arrangement to purchase gas from a new company controlled by such officers and stockholders is ultra vires, the old company having power to "purchase real and personal property," and the two companies being authorized by their franchises to combine. *Theis v. Spokane Falls Gas Light Co.*..... 477
6. SAME—INJURY TO MINORITY—EVIDENCE—SUFFICIENCY. A stockholder owning eight out of fifteen hundred shares of the capital stock of a gas company cannot complain of the action of the officers controlling all the other shares in making a contract with a new gas company controlled by them whereby the old company was to purchase all its gas from the new company, organized by them to furnish the same, rather than borrow money to enable the old company to enlarge its business to meet growing demands, where it appears that the old company thereby obtained its gas at a saving of over twenty thousand dollars less expense per year than it could manufacture the same for in its own plant, and that its affairs were economically managed; since the discretion of the majority in deciding not to increase the capacity of the old company is an act *intra vires* that cannot be questioned by the minority. *Theis v. Spokane Falls Gas Light Co.*..... 477
7. CORPORATIONS—REPRESENTATIONS—OFFICERS—AUTHORITY—CONTRACTS—EVIDENCE—SUFFICIENCY. There is sufficient *prima facie* evidence that the president of a brewing company assumed to have general management and was so held out by the corporation, thereby authorizing him to employ a physician to attend an injured employee, where it appears that he was present at the time of the accident, took charge and gave directions as to securing a physician, ambulance, and nurse, as one apparently in charge, and afterwards talked as one having general powers, and had notice that the services were being rendered in reliance upon his authority to make the employment. *Russell v. Schade Brewing Co.*..... 362
8. CORPORATIONS—OFFICERS—SALARY—FAILURE TO PERFORM SERVICES—TORTIOUS ACTS PREVENTING PERFORMANCE—LIABILITY FOR. The secretary of a corporation is not entitled to recover salary for two months during which he remained away and performed no services, where it appears that he had sold all his stock in the corporation except one share and had organized and acquired an interest in a rival concern, and that the manager had demanded that he resign or sell out his interest in the rival concern; since his conduct indicated that he had elected to comply with such demand; and in any event the corporation would not be liable for the tortious acts of the manager in preventing performance of the services, in the absence of authority or ratification by the corporation. *Roberts v. Stanton Co.* 23

CORPORATIONS—CONTINUED.

9. CORPORATIONS—SUBSCRIPTIONS TO STOCK—LIABILITY OF INCORPORATORS UPON ABANDONMENT—TRUST COMPANIES. Under Laws 1903, p. 367, prohibiting a trust company from doing business until all its capital stock is subscribed and paid in, the original incorporators are liable to a subscriber for the amount paid on his subscription upon their abandonment of the enterprise for failure to secure full subscriptions of the stock, regardless of fraud or conspiracy in the soliciting of the subscription, and although the same was solicited by and paid to only one of their number. *Miller v. Denman*..... 217
10. CORPORATIONS—DISSOLUTION—AUTHORITY OF TRUSTEES. Bal. Code, § 4274, making the trustees of a corporation upon its dissolution the trustees of the stockholders and creditors with power to settle up affairs, was intended to apply to voluntary and not to involuntary dissolutions. *Conlan v. Oudin*..... 240
11. SAME—RECEIVERS—JURISDICTION TO APPOINT—PARTIES PLAINTIFF. The last sentence of Bal. Code, § 5790, providing that upon the involuntary dissolution of a corporation, the prosecuting attorney shall at once institute proceedings for a receivership, is only directory, and does not preclude the institution of proceedings by any interested party. *Conlan v. Oudin*..... 240
12. SAME—SHOWING OF NECESSITY. Under Bal. Code, § 5790, a receiver may be appointed upon the involuntary dissolution of a corporation without a showing as to any necessity therefor. *Conlan v. Oudin* 240

COSTS:

Review of question, see **APPEAL AND ERROR**, 1.

Judgment for in supplemental proceedings, form, see **EXECUTION**.

1. Costs—ON APPEAL—DISMISSAL OF APPEAL. After appellant has moved to dismiss his appeal, the respondents cannot move to dismiss the appeal and recover costs of such motion, although they ask affirmance of the judgment. *Bleakley v. Wilcox*..... 164

COUNCIL:

Power of city council to compromise claim in favor of city, see **MUNICIPAL CORPORATIONS**, 36.

COUNSEL:

See **ATTORNEY AND CLIENT**.

COUNTERCLAIM:

See **SET-OFF AND COUNTERCLAIM**.

COUNTIES:

Appointment of court commissioners by superior judge, see **COURT COMMISSIONERS**, 1.

Establishment of township organization, majority vote, see **ELECTIONS**.

COUNTIES—CONTINUED.

- Proceedings for establishment of highways by county board, see
HIGHWAYS, 2, 3.
- Right of commissioners to sell county road to railway company, see
HIGHWAYS, 4.
- Sufficiency of title of act providing for construction of canals, see
STATUTES, 5.
1. **COUNTIES—COUNTY OFFICERS—DEPUTIES—HIGHWAYS—ESTABLISHMENT—VIEW AND REPORT.** The county engineer may appoint a deputy who has the same powers as his chief to view a proposed road and sign the report in his own name, under the general provisions of Bal. Code, §§ 1564, 1695, relating to deputies of county officers, and Laws 1907, p. 352, referring to the county "engineer or his deputy." *State ex rel. Murhard Estate Co. v. Superior Court*... 392
2. **SAME—APPOINTMENT OF DEPUTY—RATIFICATION.** The appointment of a deputy county engineer will be considered ratified by the county commissioners, where the commissioners accepted and acted upon his view and report of a proposed county road. *State ex rel. Murhard Estate Co. v. Superior Court*..... 392
3. **SAME—VALIDITY OF APPOINTMENT—COLLATERAL ATTACK.** The appointment of a deputy county engineer cannot be questioned collaterally in an attack upon his view and report of a proposed county road. *State ex rel. Murhard Estate Co. v. Superior Court*..... 392

COUNTY COMMISSIONERS:

Control of county roads, authority to sell to railway company, see
HIGHWAYS, 4.

COURT COMMISSIONERS:

Order of reference to in supplemental proceedings, see **REFERENCE**.

1. **COURT COMMISSIONERS—APPOINTMENT—CONSTITUTIONAL LAW.** Constitution, art. 4, § 23, providing that the superior judge may appoint one or more court commissioners with certain powers cannot be limited by an act of the legislature to superior courts in counties having a resident judge, but applies to superior courts in all counties. *Howard v. Hanson*..... 314
2. **SAME—POWERS—REFERENCE—EXECUTION—SUPPLEMENTAL PROCEEDINGS.** Court commissioners are authorized to take evidence under an order of reference in supplemental proceedings and report thereon to the court, by virtue of Const. art. 4, § 23, conferring upon court commissioners the power to perform "such other business in the administration of justice as may be prescribed by law," and Bal. Code, § 4729, authorizing court commissioners to take testimony and proofs in all cases and report thereon, administer oaths and compel the attendance of witnesses. *Howard v. Hanson*..... 314

COURTS:

See COURT COMMISSIONERS.

Pendency of action in federal court as ground for abatement of action in state court, see ABATEMENT AND REVIVAL.

Review of decisions, see APPEAL AND ERROR, 1-3.

Supersedeas by supreme court, see APPEAL AND ERROR, 13, 15.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 39, 40.

Effect of dismissal in bankruptcy as precluding prosecution in state courts, see BANKRUPTCY.

Judicial power, see CONSTITUTIONAL LAW, 1.

Residence of judge as affecting jurisdiction, see JUDGES.

Jurisdiction of proceedings assessing property for local improvement, see MUNICIPAL CORPORATIONS, 5, 17-19.

Order *nunc pro tunc* changing date of filing delinquency certificate, see TAXATION, 3.

Trial by court without jury, see TRIAL, 16.

1. COURTS—DECISIONS—FEDERAL QUESTIONS. Whether provisions of an act of Congress constituted conditions subsequent is a Federal question, upon which the decisions of the United States courts are controlling. *Spokane and British Columbia R. Co. v. Washington & Great Northern R. Co.*..... 280
2. COURTS—JURISDICTION — APPELLATE COURTS — DIVORCE — ALIMONY PENDING APPEAL. The supreme court has original jurisdiction to entertain an application for temporary alimony, attorney's fees and suit money pending an appeal from a judgment of divorce in favor of a wife, under the statutes requiring a trial *de novo* on appeal and declaring that the supreme court shall be possessed of the whole case as fully as the trial court was, and under Const. art. 4, § 4, giving the supreme court power to issue all writs necessary and proper to the complete exercise of appellate and revisory jurisdiction. *Holcomb v. Holcomb*..... 498
3. COURTS — JURISDICTION — APPELLATE COURTS—DIVORCE — ALIMONY PENDING APPEAL. The supreme court has original jurisdiction to entertain an application for temporary alimony, attorney's fees and suit money pending an appeal from a judgment of divorce in favor of a wife, under the statutes requiring a trial *de novo* on appeal and declaring that the supreme court shall be possessed of the whole case as fully as the trial court was, and under Const. art. 4, § 4, giving the supreme court power to issue all writs necessary and proper to the complete exercise of appellate and revisory jurisdiction. *Sullivan v. Sullivan*..... 508

CRIMINAL LAW:

See FALSE PRETENSES; GAMING.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 34, 35.

Allegations in indictment, see INDICTMENT AND INFORMATION.

CRIMINAL LAW—CONTINUED.

Confinement of persons acquitted on ground of insanity, see **INSANE PERSONS.**

Violation of liquor laws, see **INTOXICATING LIQUORS**, 3-5.

Words charging crime as libelous *per se*, see **LIBEL AND SLANDER**, 1.

Judicial notice of ordinance in prosecution for violation of, see **MUNICIPAL CORPORATIONS**, 1.

Sufficiency of title of acts relating to crimes and punishments, see **STATUTES**, 3, 4.

Trial of civil actions, see **TRIAL**.

1. **CRIMINAL LAW—EVIDENCE—GOOD CHARACTER—RELEVANCY.** It is not error to restrict the examination of the accused as to particular matters concerning his previous occupations for the purpose of establishing good character, where accused had been allowed to state the same generally and go as far as circumstances required. *State v. Clem* 273
2. **SAME.** Evidence offered by the accused concerning his family and of whom it consisted is properly excluded when it would only distract the attention of the jury from the issue. *State v. Clem*. 273
3. **CRIMINAL LAW—DISMISSAL FOR FAILURE TO PROSECUTE—APPEAL—STATUTES—CONSTRUCTION.** Where the accused, convicted in a police court, has on appeal been discharged from custody on giving bond to appear and prosecute his appeal, he is not entitled to a dismissal of the charge because more than sixty days elapsed without trial after the taking of the appeal, where he made no demand for trial, under Bal. Code, § 6911, requiring the dismissal of a prosecution if the accused is not brought to trial within sixty days after the information is filed if the trial was not postponed on his application; since he was accorded a speedy trial in the police court, and was bound to demand trial on appeal for his own benefit, under Bal. Code, § 6763, requiring him to appear and prosecute the appeal. *State v. Parmeter*..... 435
4. **CRIMINAL LAW—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.** It is not reversible error, in an instruction as to reasonable doubt, to say that such doubt could only be entertained from the want of evidence to satisfy the jury beyond a reasonable doubt, when, considered in connection with other instructions, it was incapable of prejudicing the accused. *State v. King*..... 31
5. **SAME—APPEAL—REVIEW.** The appellate court is not warranted in setting aside a conviction for insufficiency of the evidence where there was substantial evidence of appellant's guilt. *State v. Clem* 273

CROPS:

Destruction of infected fruit by county inspector, see **AGRICULTURE**.

CROSS-EXAMINATION:

See **WITNESSES**, 3.

CROSSINGS:

Over prior railroad right of way, conditions imposed, see EMINENT DOMAIN, 1.

CUSTOMS AND USAGES:

Relevancy of evidence as to customs and course of business, see EVIDENCE, 1.

Manner of doing work as constituting negligence of servant, see MASTER AND SERVANT, 8.

DAMAGES:

Action to recover for destruction of infected fruit, see AGRICULTURE.. Ejection of passenger, see CARRIERS, 10.

For timber taken upon rescission of contract for mutual mistake, see CONTRACTS, 4.

Attorney's fees as damages in action on indemnity contract, see INDEMNITY, 3.

As inadequate compensation for trespass, see INJUNCTION, 1.

For libel or slander, see LIBEL AND SLANDER, 10.

Injuries from public improvements, see MUNICIPAL CORPORATIONS, 9, 16.

Stipulated damages as defense to action by corporation to quiet title, see QUIETING TITLE, 1.

For breach by seller of contract for sale of goods, see SALES, 4, 6.

Breach by vendor of contract for sale of land, see VENDOR AND PURCHASER, 10.

1. DAMAGES — SUBSTANTIAL DAMAGES — EVIDENCE — SUFFICIENCY — OPINIONS — COMPETENCY. The evidence is sufficient to establish substantial damages, and it is error to find only nominal damages, where it appears that, in violation of a contract, a water company failed for three years to supply water to plaintiff for the purpose of irrigating a garden tract of nine acres, whereby the crops failed to mature for lack of water and were materially damaged, and that the net value of the crop for 1904 was \$600 less than it would have been, and for 1905, \$700 less, and for 1906, \$860 less, according to the estimate or opinion of one of the parties, which is competent but not conclusive evidence of the actual loss; and judgment for substantial damages will be given in at least the sum appearing to have been sustained. *Hutchinson v. Mt. Vernon Water and Power Co.* 469

2. DAMAGES — PERSONAL INJURIES — MEASURE OF DAMAGES — FUTURE PAIN — INSTRUCTIONS. In an action for personal injuries it is reversible error to instruct that the plaintiff may recover for the pain and suffering "which he may suffer in the future," as the recovery must be confined to such future pain and suffering as is reasonably certain to result from the injury. *Ongaro v. Twohy* 93

DAMAGES—CONTINUED.

3. **DAMAGES—PERSONAL INJURIES—RESULTING DAMAGES—REBREAKING OF LEG.** In an action for personal injuries from the breaking of a leg, where, three months after the accident, the plaintiff was permitted by the physician to go about on crutches and fell and rebroke his leg, he may recover the entire damages sustained, if he exercised reasonable care at the time of the fall, and if the second injury was attributable to the first. *Hoseth v. Preston Mill Co.*..... 682
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.** A verdict for \$1,600 in favor of a previously strong woman, for an injury to the hip in the nature of a dislocation, affecting the muscles and nerves of the back, causing lameness and considerable suffering, and preventing performance of work as theretofore, is not excessive. *Larsen v. Sedro-Woolley*..... 134
5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$7,500 reduced by the trial court to \$5,000, is excessive and a new trial will be granted on appeal unless all but \$2,500 is remitted, where it appears that the plaintiff, an able-bodied carpenter thirty-two years of age, was injured in the groin in a street car collision, that he was confined to his bed more than a week, and up to the time of the trial, eight months thereafter, had been unable to work, continuously suffered pain, and could walk with difficulty, and one physician testified that his spine was permanently injured, but the great weight of the evidence indicated no permanent injury and the jury appears to have been influenced by passion or prejudice. *Hem-enway v. Washington Water Power Co.*..... 338
6. **DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.** A verdict for \$2,000 for personal injuries to the leg and foot, resulting in chronic synivitis, is not excessive, where it appears that the plaintiff suffered continued pain up to the time of the trial, it was impossible for her to do her ordinary housework, the injury affected her earning capacity in giving music lessons, and she was put to considerable expense, and might need a surgical operation. *Hageness v. Tacoma R. & Power Co.*..... 590
7. **DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.** A verdict for \$4,000 for personal injuries sustained by a married woman, thirty-nine years of age, of unusually good health and extraordinary bodily strength, is not excessive where it appears that, at the time of the trial, she was in a neurasthenic condition, and honestly so, according to the opinions of the doctors, that her hair had turned from coal black to gray, that she suffered for three months to such an extent that she could not leave her bed, and had constantly since suffered, was not able to do her housework, had become prematurely old and had lost her sexual powers, the verdict having been reduced by the trial judge, who heard and saw her and the witnesses, from \$5,410 to \$4,000. *Garthley v. Seattle Electric Co.*..... 616

DAMAGES—CONTINUED.

8. **DAMAGES—PHYSICAL CONDITION PRIOR TO INJURY—EVIDENCE—REMOTENESS.** In an action for personal injuries, evidence of statements made four years prior to the accident as to the hysterical and nervous condition of the plaintiff is inadmissible, the same being too remote. *Larsen v. Sedro-Woolley*..... 134
9. **DAMAGES—PERSONAL INJURIES—EVIDENCE—MORTALITY TABLES—AGE—ADMISSIBILITY.** In an action for permanent injuries, mortality tables for the years between 54 and 60, to show plaintiff's life expectancy, are admissible, although he is a negro and his age was not shown, except that he was born in slavery and was between fifty and fifty-six years old, the question of his age being for the jury. *Suell v. Jones*..... 582
10. **SAME—JUDICIAL NOTICE—PLAINTIFF'S ACCEPTABILITY FOR INSURANCE.** Standard mortality tables are admissible in evidence to show plaintiff's life expectancy without proving that he was acceptable for insurance, inasmuch as judicial notice may be taken that the authoritative tables differ but slightly, and that many are not based upon insurance statistics. *Suell v. Jones*..... 582
11. **SAME—INSTRUCTIONS—DETERMINING AMOUNT.** In an action for personal injuries, an instruction on the subject of damages does not authorize the jury to go outside the evidence, in that they were told to consider all the evidence in the case and all the facts and circumstances and use their own judgment in arriving at the amount that would in their opinion adequately compensate the plaintiff. *Suell v. Jones*..... 582
12. **SAME—INSTRUCTIONS.** An instruction as to damages caused by a fall from crutches three months after the original injury, to the effect that plaintiff is not guilty of negligence in using the leg before complete recovery, with permission of the physician, in "the absence of bad faith," and may recover for injuries while walking around "in good faith" is erroneous, in failing to require reasonable care by the plaintiff; and is not cured by a contradictory instruction on the subject of "contributory" negligence. *Hoseth v. Preston Mill Co.* 682

DANGEROUS MACHINERY AND APPLIANCES:

See **MASTER AND SERVANT.**

DEBTOR AND CREDITOR:

See **BANKRUPTCY; FRAUDULENT CONVEYANCES.**

DECEDENTS:

Testimony as to transactions with persons since deceased, see **WITNESSES**, 1.

DECISION:

On appeal, see **APPEAL AND ERROR**, 39, 40.

Decision of courts in general, see **COURTS**.

Duty of court to give decision in writing, see **TRIAL**, 16.

DEDICATION:

Implied dedication and acceptance of public street, see MUNICIPAL CORPORATIONS, 25.

1. DEDICATION—PARKS—ORAL DEDICATION — EVIDENCE — SUFFICIENCY. There is sufficient evidence of an oral dedication of a park where the owners platted adjoining lands into lots and blocks, giving out blue prints showing the park, and selling lots on representations that the same abutted on the park, and permitted general use of the same as a public park for many years. *Lueders v. Tenino*..... 521

DEEDS:

Description of boundaries, see BOUNDARIES, 1, 6.

Cancellation, see CANCELLATION OF INSTRUMENTS.

In escrow, see ESCROWS.

Between husband and wife, see HUSBAND AND WIFE, 1.

Tender of deed as condition precedent to forfeiture of contract, see VENDOR AND PURCHASER, 4.

DEFAMATION:

See LIBEL AND SLANDER.

DEFAULT:

Judgment by, see JUDGMENT, 2.

Right of vendee to performance after default, see SPECIFIC PERFORMANCE, 6.

DEFENSES:

See PLEADING.

In action on promissory note, see BILLS AND NOTES.

In action to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES.

Ignorance in use of X-ray machine as defense in action for malpractice, see PHYSICIANS AND SURGEONS, 2.

DELIVERY:

Of goods by carrier, see CARRIERS, 1, 2.

DEMURRER:

Oral demurrer at trial, see TRIAL, 1.

DENIALS:

In pleading, see PLEADING, 3.

DEPOSITIONS:

1. DEPOSITIONS—ADMISSION IN EVIDENCE — PRESUMPTION AS TO REASONS FOR TAKING. Under Bal. Code, § 6028, which provides that a deposition shall not be read in evidence if it appears at the trial that the reason for taking the same no longer exists, it will be presumed that the reason continues to exist until the contrary is shown by the adverse party, and the deposition is admissible without any showing. *Heinzerling v. Agen*..... 647

DEPUTIES:

Appointment of deputy county engineer, see COUNTIES.

DESCENT AND DISTRIBUTION:

See WILLS.

DESCRIPTION:

Of property conveyed, see BOUNDARIES, 1, 6.

Error in application to purchase land for right of way, conflict in locations, see RAILROADS, 1.

Of property on assessment roll, effect on tax foreclosure, see TAXATION, 1.

Of person or property in summons for foreclosure sale, see TAXATION, 4, 5.

DEVISE:

See WILLS.

DILIGENCE:

Affecting right to new trial, see NEW TRIAL, 4.

DISCHARGE:

In bankruptcy, see BANKRUPTCY.

From custody of person acquitted on ground of insanity, see INSANE PERSONS.

DISCRETION OF COURT:

Review in civil actions, see APPEAL AND ERROR, 17, 21, 22.

New trial, see NEW TRIAL, 1.

To allow amendment of pleadings, see PLEADING, 5.

Reopening case for further evidence, see TRIAL, 4.

DISCRIMINATION:

Violation of interstate commerce law in carriage of goods, see COMMERCE, 1-4.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 2, 6.

Right to enter dismissal precluding further prosecution in state courts, see BANKRUPTCY.

Costs on dismissal or nonsuit, see Costs.

Dismissal of charge for failure to prosecute, see CRIMINAL LAW, 3.

Judgment of dismissal as *res adjudicata*, see JUDGMENT, 8.

Waiver of motion for nonsuit at trial, see TRIAL, 17.

1. DISMISSAL AND NONSUIT—VOLUNTARY. Under Bal. Code, § 5085, the plaintiff is entitled to voluntary nonsuit at any time before the jury retires, if there is no set-off or counterclaim interposed. *Fisk v. Tacoma Smelting Co.*..... 514

DISSOLUTION:

Of corporation, see CORPORATIONS, 10-12.
Of partnership, see PARTNERSHIP, 3.

DIVERSION:

Temporary transfer as loan from general to special fund, see MUNICIPAL CORPORATIONS, 35.

DIVORCE:

Original jurisdiction of supreme court to award alimony and suit money pending appeal, see COURTS, 2, 3.

Grounds for granting writ of *ne exeat* pending appeal, see NE EXEAT.

1. DIVORCE—ALIMONY—SUIT MONEY—PENDING APPEAL. A proper case for the allowance of suit money and alimony pending appeal is shown where the wife secured a judgment of divorce, with alimony, which was superseded on the husband's appeal from the allowance of alimony, and the wife was without means of support for herself and child. *Holcomb v. Holcomb*..... 498
2. SAME—ALIMONY—AMOUNT. A wife who has been granted a divorce will, pending appeal, be allowed \$100 per month alimony, and \$150 per month for the care of a sick child, where it appears that the husband has possession of property of the value of over a quarter of a million dollars, and the wife is necessarily in another state for the treatment of the child under the care of a physician. *Sullivan v. Sullivan*..... 508
3. DIVORCE—SUIT MONEY PENDING APPEAL. In fixing suit money and attorney's fees pending appeal in a divorce case, the supreme court will grant only a fair amount for necessary expenses, leaving the ultimate amount of the attorney's fees to the final adjudication of the case. *Holcomb v. Holcomb*..... 498
4. DIVORCE—ALIMONY—SUIT MONEY—ALLOWANCE PENDING APPEAL. A sufficient showing is made for the allowance of alimony and suit money to a wife, pending the husband's appeal from a judgment disposing of community property, where he has control of a substantial amount of property and the wife is without means of support for herself and minor children, or for legal services. *Sullivan v. Sullivan*
5. DIVORCE—SUIT MONEY PENDING APPEAL. In fixing suit money and attorneys fees pending appeal in a divorce case, the supreme court will grant only a fair amount for necessary expenses, leaving the ultimate amount of the attorney's fees to the final adjudication of the case. *Sullivan v. Sullivan*..... 508

DOCTORS:

See PHYSICIANS AND SURGEONS.

DOMICILE:

Of parties as affecting venue, see VENUE.

DUE PROCESS OF LAW:

Forfeiture of liquor license for violation of law as deprivation of property without due process, see INTOXICATING LIQUORS, 5.

EJECTION:

Of passengers, see CARRIERS, 8-10.

ELECTION:

To treat mortgage debt as due on default, see MORTGAGES, 4-6.

Cessation of controversy as ground for denial of injunction, see APPEAL AND ERROR, 6.

ELECTIONS:

Submission of question of municipal expenditures in general, see MUNICIPAL CORPORATIONS, 31, 33.

For construction of public improvements, see MUNICIPAL CORPORATIONS, 3, 31, 33.

1. ELECTIONS — MAJORITY — STATUTES — CONSTRUCTION — COUNTIES — TOWNSHIP ORGANIZATION. Const. art. 2, § 4, providing for the establishment of township organization "whenever a majority of the qualified electors of such county voting at a general election shall so determine" does not authorize township organization upon a majority of those voting upon the question, although the legislature so construed the clause in Laws 1895, p. 473, but only upon a majority of the total votes cast at the election. *State ex rel. Milliken v. Board of Commissioners*..... 70

ELOIGNMENT:

See LOGS AND LOGGING, 4.

EMINENT DOMAIN:

Condemnation of land for county road, review of question of necessity, see HIGHWAYS, 3.

Assessment to pay compensation for property taken for public use, see MUNICIPAL CORPORATIONS, 9, 11, 12, 18, 19.

Collateral attack on proceedings to condemn property for local improvement, see MUNICIPAL CORPORATIONS, 18, 19.

1. EMINENT DOMAIN—RAILROADS—CROSSINGS—CONDITIONS — COST OF MAINTENANCE. In condemning the right to cross at grade the right of way of a prior railroad company, it is proper to charge to the petitioner the cost of installing and maintaining a necessary interlocking device as to the tracks already in operation, or to be constructed within a reasonable time by the prior company to accommodate business already accumulated; but it is error to cover any or all tracks that the prior company might construct at that point in the future, or to confine the petitioner to a single track, as future contingencies should be left to future determination. *State ex rel. North Coast R. v. Northern Pac. R. Co.*..... 78

EMINENT DOMAIN—CONTINUED.

2. **EMINENT DOMAIN—NECESSITY—CERTIORARI—REVIEW—EVIDENCE—SUFFICIENCY.** Upon certiorari to review an order of condemnation by one railroad of part of the lands of another, the necessities of the two roads present questions of fact, and the findings of the trial judge will not be disturbed, where he had the advantage of seeing the witnesses, unless it is shown to be erroneous. *State ex rel. Northern Pac. R. Co. v. Superior Court* 390
3. **SAME—RIGHT TO CONDEMN—SUBSCRIPTION TO STOCK—EVIDENCE—SUFFICIENCY.** Upon condemnation proceedings by a railroad company, a showing as to the subscription of its stock is sufficient although the principal portion was subscribed for by a stenographer, without means, employed in the office of the president of the company upon a small salary. *State ex rel. Northern Pac. R. Co. v. Superior Court* 390

EMPLOYEES:

See **MASTER AND SERVANT.**

ENACTMENT:

Of statutes, see **STATUTES**, 3-9.

ENFORCEMENT:

Of pledge, wrongful sale of collateral, see **PLEDGES**.

ENTRY:

Of judgment, see **JUDGMENT**, 4, 5.

EQUITY:

See **CANCELLATION OF INSTRUMENTS; INJUNCTION; SPECIFIC PERFORMANCE.**

Findings as constituting prejudicial error, see **APPEAL AND ERROR**, 36.

Equitable estoppel, see **ESTOPPEL**.

Determination of adverse claims to real property, see **QUIETING TITLE**.

ESCROWS:

1. **ESCROWS—LEGALITY—CONDITIONS RESTING IN PAROL—EVIDENCE—SUFFICIENCY—SPECIFIC PERFORMANCE.** There is a legal escrow agreement that may be specifically enforced, where the deed was deposited in escrow in a bank to be subsequently executed by the wife, which was done, and at the same time money, notes and warrants were likewise deposited by the grantee, the warrants to be endorsed by one who was temporarily absent, who endorsed the same within a reasonable time, although the papers were only accompanied by an unsigned memorandum, as of a "special deposit," reciting that the deed was to be delivered on payment of the deposited consideration, the other conditions of the escrow resting on parol. *Manning v. Foster* 541

ESTABLISHMENT:

Of boundaries, see **BOUNDARIES**, 2-6.
Of highways, see **HIGHWAYS**.

ESTOPPEL:

Of state to assert title to bed and shores of navigable lake, see **ADVERSE POSSESSION**, 3.
Right to raise question for first time on appeal, see **APPEAL AND ERROR**, 7, 8.
To assert fraud in execution of contract, see **CONTRACTS**, 1.
To set up statute of frauds, see **FRAUDS, STATUTE OF**, 2.
Of subtenant to enjoin violation of conditions as to use of part of building, see **LANDLORD AND TENANT**, 2.
To make reassessment for local improvement, see **MUNICIPAL CORPORATIONS**, 20.
To assert right of specific performance, see **SPECIFIC PERFORMANCE**, 5.

1. **ESTOPPEL—FAILURE TO ASSERT TITLE—HUSBAND AND WIFE—COMMUNITY PROPERTY—SEPARATION AGREEMENT.** A wife who entered into a separation agreement in 1886, whereby the community property was divided and future acquisitions were to be considered the separate estate of either husband or wife, who thence lived separate and apart, is estopped to claim an interest in lands acquired by the husband in 1892, where she then also made a quitclaim deed of the property to him, and made no claim thereto for more than fourteen years and for more than five years after her husband had sold the same to innocent purchasers. *Hayden v. Zerbst*..... 103

EVIDENCE:

Review of ruling as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 30, 32, 35.
Scope of review of sufficiency of evidence, see **APPEAL AND ERROR**, 23-25, 27, 29.
On bill or note, see **BILLS AND NOTES**.
To establish boundaries, see **BOUNDARIES**, 5.
In suit for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**, 1, 2.
Of defect causing injury to passenger, see **CARRIERS**, 4.
Negligence of passenger in purchasing ticket, see **CARRIERS**, 9.
Authority of corporate officer or agent, see **CORPORATIONS**, 7.
Of injury to minority stockholders through combination with other company, see **CORPORATIONS**, 5.
Of fraud warranting rescission of sale of corporate stock, see **CORPORATIONS**, 3.
As to good character of accused, see **CRIMINAL LAW**, 1, 2.
Review of evidence in criminal prosecution, see **CRIMINAL LAW**, 5.
Admissibility of mortality tables, see **DAMAGES**, 9, 10.
Physical condition prior to injury, see **DAMAGES**, 8.
Competency of opinion as to evidence of damages, see **DAMAGES**, 1.

EVIDENCE—CONTINUED.

- Of dedication, see DEDICATION.
- Depositions as evidence, see DEPOSITIONS.
- Of escrow agreement, see ESCROWS.
- Of subscription to corporate stock warranting right to condemnation, see EMINENT DOMAIN, 3.
- Of collusion in establishment of highway, see HIGHWAYS, 2.
- Of establishment of highway by prescription, see HIGHWAYS, 1.
- Of assent of wife in sale of community property, see HUSBAND AND WIFE, 3.
- For libel and slander, see LIBEL AND SLANDER, 3, 5, 6.
- In action for injuries to servant, see MASTER AND SERVANT, 6, 7, 10, 13.
- Of dangerous condition of street, see MUNICIPAL CORPORATIONS, 26.
- Of location of defect causing injury, whether in public street, see MUNICIPAL CORPORATIONS, 25.
- Notice to municipality of defect or obstruction in street, see MUNICIPAL CORPORATIONS, 29.
- Judicial notice of city ordinance, see MUNICIPAL CORPORATIONS, 1.
- Establishing *prima facie* case of negligence, see NEGLIGENCE.
- Existence of partnership, see PARTNERSHIP, 1.
- Of dissolution agreement to pay sum overdrawn by partner, see PARTNERSHIP, 3.
- For negligence or malpractice, see PHYSICIANS AND SURGEONS, 1.
- Admissibility of evidence under pleading, see PLEADING, 7.
- Of value of collateral sold in bad faith, see PLEDGES, 2.
- Ratification of agents' acts, see PRINCIPAL AND AGENT, 1, 3.
- In suits to quiet title, see QUIETING TITLE.
- In action to restrain trespass by rival company, conflict between survey and location of right of way, see RAILROADS, 1.
- Parol evidence to vary terms of written contract, see SALES, 2.
- Intent of donor to make gift of land, see SPECIFIC PERFORMANCE, 4.
- Applicability of instructions to evidence, see TRIAL, 12, 13.
- Instructions as to preponderance of evidence, see TRIAL, 11.
- Questions of fact for jury, see TRIAL, 7.
- Comment by court on evidence, see TRIAL, 2, 8.
- Of nonperformance of contract by vendee, see VENDOR AND PURCHASEE, 9.
- Of ability to perform contract, see VENDOR AND PURCHASEE, 7.
- Competency, attendance, credibility and examination of witnesses, see WITNESSES.
1. EVIDENCE—CUSTOM. Proof of a custom to take deeds for state roads in the name of a county is inadmissible where the statute requires them to be taken in the name of the state. *State ex rel. Atkinson v. Dunlap*..... 385
 2. SAME—APPLICABILITY TO ISSUES. Testimony as to what might have happened, upon a contingency as to which there was no evidence in the case, is properly excluded. *Hoseth v. Preston Mill Co.* 682

EVIDENCE—CONTINUED.

3. EVIDENCE—COMPETENCY—VALUE OF PROPERTY. A rejected offer of a price for property, made in good faith, is competent evidence of its value, as against the owner denying such value. *German-American State Bank v. Spokane-Columbia River R. & Nav. Co.*..... 359
4. EVIDENCE—ADMISSIONS—EFFORT TO COMPROMISE. Evidence is inadmissible of a conversation with the mayor of a town relating to an effort to compromise the plaintiff's suit against the town. *Larsen v. Sedro-Woolley*..... 134
5. EVIDENCE—ADMISSIONS—ENTRY IN ACCOUNT Book. In an action for services as a physician, rendered to defendant's employee under a specific contract of employment made by the defendant, an entry in the physician's account books against the employee "care of the defendant" is not a conclusive admission that the services were originally rendered to the employee only, the physician testifying that the entry was simply for the purpose of identifying the account. *Russell v. Schade Brewing Co.*..... 362
6. EVIDENCE—PAROL—WRITTEN CONTRACTS — INTENT—AMBIGUITIES — PARTNERSHIP. A contract is so ambiguous or indefinite as to admit of parol evidence of the surrounding conditions and circumstances in order to show an intent to form a partnership, where the contract provided that, in consideration of a one-third interest in all mining claims and property to be acquired, and one-third of the proceeds of a stock of goods valued at \$20,000, the plaintiff endorsed notes for \$6,000 to enable two others to take the stock into Alaska and establish a trading post and locate and deal in mining claims, etc., the notes to be paid from the profits if sufficient was realized, and the contract further providing that if the business should be continued more than one season, each of the three parties to the contract shall furnish, in addition to his services, one-third of the necessary funds for the next season. *Causten v. Barnette*..... 659
7. EVIDENCE—CONCLUSIONS—MASTER AND SERVANT—WARNING. It is not error to exclude evidence that a man could not remain in a logging camp a single day without hearing warnings to keep away from the lead lines, the same being a conclusion for the jury. *Hoseth v. Preston Mill Co.*..... 682

EXAMINATION:

Of witnesses in general, see **WITNESSES**.

EXCEPTION:

Mode of taking for purpose of review, see **APPEAL AND ERROR**, 8.

EXCESSIVE DAMAGES:

See **DAMAGES**, 4, 7.

For wrongful ejection of passenger, see **CARRIERS**, 10.

In action for slander, see **LIBEL AND SLANDER**, 10.

EXECUTION:

Of contract through fraud, see CONTRACTS, 1.

Authority of court commissioners in supplemental proceedings, see COURT COMMISSIONERS, 2.

Of lease of community property, see HUSBAND AND WIFE, 2.

Order of reference in supplemental proceedings, see REFERENCE.

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—JUDGMENT FOR COSTS—FORM. A judgment in supplemental proceedings requiring the judgment debtor to deliver certain personal property to the sheriff cannot require the payment of costs into court; but under Bal. Code, § 5327, a fixed sum may be allowed as costs, to be paid out of any money which may come to the hands of the sheriff or receiver within a specified time. *Howard v. Hanson*..... 314

EXECUTORS AND ADMINISTRATORS:

Rights of devisee or legatee as against executor, see WILLS.

Competency of witnesses to testify to transactions with decedent, see WITNESSES, 1.

EXEMPTION:

Claim by mortgagors after foreclosure sale, see MORTGAGES, 2, 3.

Of property from assessment for benefits from local improvement, see MUNICIPAL CORPORATIONS, 16.

EX POST FACTO:

Laws relating to release of criminal insane, see INSANE PERSONS, 3, 4.

EXTRAS:

Compensation to contractor for, see CONTRACTS, 5, 6.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 1, 2, 12.

FAILURE OF PROOF:

In action for slander, see LIBEL AND SLANDER, 5.

FALSE REPRESENTATIONS:

As ground for rescission of sale of personality, see SALES, 1.

FALSE PRETENSES:

1. FALSE PRETENSES—INFORMATION—SUFFICIENCY. An information charging the obtaining of money under false pretenses, by presenting wild cat scalps to a county auditor, when the accused had not killed the wild cats in said county or within a period of three months previous thereto, under Bal. Code, § 7165, is not demurrable and the facts are not inapplicable to the crime charged by reason of Laws of 1905, p. 122, making it a misdemeanor to offer scalps of wild cats that were killed out of the state or prior to the passage of the act; since the information does not show that the wild cats were killed out of the state or prior to the act. *State v. King*..... 31

FEDERAL COURTS:

Federal questions controlled by decisions of, see COURTS, 1.

FEES:

Failure of clerk to collect fees as affecting validity of judgment, see JUDGMENT, 5.

FELLOW SERVANTS:

See MASTER AND SERVANT, 3, 5.

FILING:

Delinquency certificates, order *nunc pro tunc* changing date of filing, see TAXATION, 3.

FINDINGS:

Review on appeal or writ of error, see APPEAL AND ERROR, 18, 23, 24, 29.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 36.

Review on appeal from condemnation proceedings, see EMINENT DOMAIN, 2.

Duty of court to enter written findings, see TRIAL, 16.

FIRE:

Liability of carrier for loss of goods in warehouse, see CARRIERS, 1, 2.

FORECLOSURE:

Of mortgage, see MORTGAGES.

Of tax lien, see TAXATION.

FOREIGN STATUTES:

Necessity for pleading, see STATUTES, 11.

FORFEITURE:

Construction of contract as to forfeiture, see CONTRACTS, 3.

Of liquor license, see INTOXICATING LIQUORS, 4.

Of lands granted to railroads, see PUBLIC LANDS, 1.

Right of vendee to performance after refusal to accept contract, see SPECIFIC PERFORMANCE, 6.

Of contract to convey land, see VENDOR AND PURCHASER, 4, 5.

FORMER ADJUDICATION:

See JUDGMENT, 6, 8.

FRANCHISE:

Corporate franchises, see CORPORATIONS, 2, 5.

FRAUD:

See FALSE PRETENSES.

As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.

In securing signature to contract, see CONTRACTS, 1.

In sale of personality, see SALES, 1, 2.

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM—ESCROWS—EVIDENCE OF CONDITION. The conditions upon which a deed is delivered in escrow need not be evidenced by a written memorandum in order to satisfy the statute of frauds relative to the sale of lands; but may be shown partly by writing and partly by parol. *Manning v. Foster* 541

2. FRAUDS, STATUTE OF—ORAL AGREEMENT TO CONVEY LAND—PART PERFORMANCE—ESTOPPEL. There is such part performance of an oral contract to purchase land for another as to take the same out of the operation of the statute of frauds, where it appears that a member of a firm was orally employed upon a stated consideration to secure a sale of county property and bid it in for the purchaser; that, without the purchaser's consent, he took the deed in the name of his partner; that the purchaser went into possession and made permanent improvements by erecting buildings, and maintained possession for two and one-half years, without any protest or objection from either of the partners, who knew that the purchaser was relying upon the oral agreement, and who delayed accepting tender of the amount paid from time to time without questioning the purchaser's right to the land; as they would be estopped from setting up the statute of frauds. *Kennedy v. Anderson* 14

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES—BY INSOLVENT CORPORATION—LIABILITY OF ASSIGNEE—DEFENSES—PAYMENT OVER TO CREDITOR—BANKS. Where a bank was a creditor, and also held for collection the claim of another creditor, of an insolvent corporation, and the corporation made a void assignment to the bank with the understanding that from the moneys received the bank should pay itself and the other creditor the amount of their claims, the bank is not liable to the receiver of the corporation for the amount of collections made by it, where it appears that the sum collected was only sufficient to pay the indebtedness of the other creditor and had all been paid over to and applied upon the indebtedness of the other creditor. *Farmers & Mechanics Bank v. Strahorn* 227

FREIGHT:

Regulation by interstate commerce law of rates and charges, see COMMERCE.

FUTURE PAIN:

Measure of damages, see **DAMAGES**, 2.

GAMING:

Proceedings at trial constituting prejudicial error, see **APPEAL AND ERROR**, 34, 35.

Conviction of lesser offense, see **INDICTMENT AND INFORMATION**, 2.

1. **GAMING—SECURITY—INFORMATION—SUFFICIENCY.** Bal. Code, § 7260, prohibiting each and every person from dealing, carrying on, opening or conducting "either as owner, proprietor, employee, whether for hire or not," any game of . . . roulette . . . played for gain, is not limited to the conducting of public games, but includes games secretly carried on from which the public is excluded. *State v. Preston* 298
2. **SAME—CAPACITY OF PERSON IN GAME.** Under such section, "each and every person" is prohibited from gaming and it is not necessary to allege the capacity in which the game was conducted. *State v. Preston* 298
3. **GAMING—DEFENSES—OWNERSHIP OF MONEY Lost.** It is no defense to an action to recover money lost at gambling that the same was not the property of the plaintiff. *Crowley v. Taylor* 511

GAS:

Combination of companies for manufacture of, construction of city ordinance, see **CORPORATIONS**, 2.

GIFTS:

Specific performance of promise to convey land, see **SPECIFIC PERFORMANCE**, 3-5.

GRANTS:

Of public lands, see **PUBLIC LANDS**.

GUARANTY:

See **INDEMNITY**.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 30-38.

Exclusion of evidence to show condition and use of appliance after injury to servant, see **MASTER AND SERVANT**, 10.

HIGHWAYS:

Powers of deputy engineer to view and report, see **COUNTIES**, 1.

Defects in city streets, see **MUNICIPAL CORPORATIONS**, 25, 29.

1. **HIGHWAYS—ESTABLISHMENT BY PRESCRIPTION — EVIDENCE — SUFFICIENCY.** Adverse user sufficient to establish a public highway by prescription is not shown, where it appears that the way was first built as a skid road on private property for private logging pur-

HIGHWAYS—CONTINUED.

- poses, and afterwards used as a tram road for logging, and travel over it was similar to that over other logging roads generally regarded as private ways, and on the first claim to a public right, the owners erected gates and notices; since the use was only permissive in its character. *Stohltion v. Kitsap County* 305
2. HIGHWAYS—ESTABLISHMENT—COLLUSION—EVIDENCE—ADMISSIBILITY. Collusion between county commissioners and a railroad company in locating a proposed county road cannot be shown by the fact that the railroad company desired the location agreed to for its own purposes, where there was no evidence of improper influence or inducement. *State ex rel. Murhard Estate Co. v. Superior Court* 392
3. SAME—EMINENT DOMAIN—REVIEW—COLLATERAL ATTACK—CONCLUSIVENESS. The question of the necessity for taking certain land for the location of a county road cannot be collaterally attacked on certiorari to review the order of condemnation where no appeal or certiorari was taken from the order establishing the road, and the commissioners had jurisdiction. *State ex rel. Murhard Estate Co. v. Superior Court* 392
4. HIGHWAYS—ABANDONMENT TO COUNTY—SALE TO RAILROAD—RIGHTS OF STATE—CONTROL. Under Bal. Code, § 4338, authorizing a railroad company to appropriate any part of a public highway not within the limits of a municipal corporation, and providing that the county commissioners may agree upon the terms of the appropriation, county commissioners may sell to a railroad company a road which it had taken possession of and destroyed as a highway; and mandamus will not lie at the instance of the state to compel the county to oust the company and keep the road open, although the road was constructed in part with funds received from the state, where it would have been impracticable to keep the road in repair, the commissioners had constructed another road to take its place, and it appears that they were charged with the control of the road, and exercised their best judgment in the matter. *State ex rel. Atkinson v. Dunlap* 385

HOLIDAYS:

Proceedings on as affecting entry of judgment, see JUDGMENT, 4.

HOMESTEAD:

Possession and claim of exemption during period of redemption, see MORTGAGES, 1-3.

HUSBAND AND WIFE:

Divorce and judicial separation, see DIVORCE.

Estoppel of wife to assert title to community property, see ESTOPPEL.

HUSBAND AND WIFE—CONTINUED.

1. **HUSBAND AND WIFE—CONVEYANCES BETWEEN—COMMUNITY PROPERTY—SEPARATE PROPERTY OF HUSBAND.** Under Bal. Code, § 4539, providing that a deed from a husband or wife to the other shall divest the grantor of any community interest and create a separate estate in the grantee, property acquired by and in the possession of a husband becomes his separate property upon his wife's making a quitclaim deed thereof to him, although he subsequently proceeded to remove clouds from the title by purchasing tax titles and other interests, where such steps and the quitclaim deed were all parts of one transaction whereby the husband, living separate and apart from the wife, sought and claimed to acquire a separate estate. *Hayden v. Zerbst*..... 103
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—LEASES—EXECUTION.** A lease of community property is invalid where it was executed by the husband alone, and the wife did not authorize or assent thereto or acquiesce therein. *Ryan v. Lambert*..... 649
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—SALE BY HUSBAND—ASSENT OF WIFE—ESCROWS—EVIDENCE—SUFFICIENCY.** In an action to compel the specific performance of an escrow agreement to deliver a deed for community lands, the fact that the wife called and signed the deed while in escrow is sufficient evidence that she knew of and assented to the terms of the sale. *Manning v. Foster*.... 541

IGNORANCE:

Of physician as defense in action for malpractice, see **PHYSICIANS AND SURGEONS**, 2.

IMPEACHMENT:

Of witness, see **WITNESSES**, 5.

IMPLIED REPEAL:

Of statute or ordinance, see **STATUTES**, 7-9.

IMPROVEMENTS:

Necessity and sufficiency to constitute adverse possession, see **ADVERSE POSSESSION**, 3.

Public improvements, see **MUNICIPAL CORPORATIONS**.

INCOMPETENCY:

Of servants, see **MASTER AND SERVANT**, 5, 13.

INCOMPETENT PERSONS:

See **INSANE PERSONS**.

INCONSISTENT DEFENSES:

See **PLEADING**, 2.

INDEBTEDNESS:

Of municipality, constitutional limitation, see **MUNICIPAL CORPORATIONS**, 32-34.

INDEMNITY:

Bonds on appeal, see **APPEAL AND ERROR**, 9, 10.
 Against mechanic's lien, see **MECHANICS' LIENS**.

1. INDEMNITY—CONTRACT—ACTIONS — PLEADING — ANSWER — SUFFICIENCY. An answer in an action upon a contract to indemnify a surety company from liability on a forthcoming bond given for the defendants, is insufficient where there was no denial of the execution of the bond, or of the recovery of the judgment thereon against the plaintiff, or of the payment of the judgment, or of notice to the defendants to appear and defend the action on the bond, or any allegation of fraud, payment or other defense. *American Bonding Co. v. Dufur*..... 632
2. INDEMNITY—CONTRACTS OF — ACTIONS — DEFENSES—COMPENSATION FOR EXECUTING BOND. It is no defense to an action to indemnify a surety company on a contract from liability on a forthcoming bond, that the defendants had compensated the surety company by payment of \$15 as consideration for executing the bond, where defendants had especially contracted with the surety company to hold it harmless from damages of any kind. *American Bonding Co. v. Dufur*
3. SAME—CONTRACTS OF—ATTORNEY'S FEES AS DAMAGES. In an action on a contract to indemnify a surety company from liability on a bond given, an attorney's fee for prosecuting the action may be allowed as part of the damages, where the contract provides for the payment of such an attorney's fee. *American Bonding Co. v. Dufur*

INDICTMENT AND INFORMATION:

See **FALSE PRETENSES**.

Offenses against laws against gambling, see **GAMING**.

1. INDICTMENT AND INFORMATION—LESSER DEGREES OF OFFENSE—LARCENY. Upon a charge of larceny from the person, defendant may be convicted of petit larceny, as the same is but a lesser degree of the same offense. *State v. Clem*..... 273
2. INFORMATION—DEGREES—CONVICTION—OF LESSER OFFENSE — GAMING. The misdemeanor of dealing, carrying on, opening, or conducting, either as owner, proprietor, or employee, whether for hire or not, any game of . . . roulette . . . as defined by Bal. Code, § 7260, is necessarily included in the felony of conducting, carrying on, opening or causing to be opened, either as owner, proprietor, employee or assistant, whether for hire or not, any game of . . . roulette . . . in any house where persons resort for the purpose of playing any such game, as defined by Laws 1903, p. 63; and a conviction of the former may be had under an information for the latter offense, charging the conducting of a gambling resort by conducting and carrying on a game of roulette in a place where persons resort for that purpose. *State v. Preston*..... 298

INDORSEMENT:

Of bill or promissory note, see **BILLS AND NOTES**.

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

INJUNCTION:

Restraining removal of timber upon rescission of contract for mutual mistake, see **CONTRACTS**, 4.

Right of subtenant to enjoin violation of conditions as to use of part of building, see **LANDLORD AND TENANT**, 2.

To restrain compromise by council of claim in favor of town, see **MUNICIPAL CORPORATIONS**, 36.

Obstruction on navigable lake, riparian or littoral rights, see **NAVIGABLE WATERS**, 2.

To restrain disposition of partnership property, in action for accounting, see **PARTNERSHIP**, 7.

Trespass on railway right of way by rival company, conflict in location, see **RAILROADS**, 1.

1. **INJUNCTION — AGAINST TRESPASS — ADEQUACY OF DAMAGES.** The lessee of state tide lands may maintain an action to enjoin continuing trespasses by persons who go thereon at low tide to dig clams and destroy the clam beds, a judgment for damages not affording adequate compensation. *Sequim Bay Canning Co. v. Bugge*..... 127

2. **INJUNCTIONS — RELIEF — ACTS ALREADY PERFORMED — JUDGMENT — FORM — PLEADINGS — AMENDMENT.** In an action to enjoin the council and officers of a town from compromising and satisfying a judgment, a judgment enjoining the acts is irregular where it appears that the acts have already been performed; and the court should, on its appearing that the plaintiff is entitled to relief, give judgment setting aside the compromise and satisfaction, allowing the pleadings to be, or considering them, amended to conform to the proofs. *Farnsworth v. Wilbur*..... 416

INSANE PERSONS:

1. **INSANE PERSONS — CONFINEMENT OF INSANE CRIMINALS — DISCHARGE — PROCEEDINGS — NOTICE OF APPLICATION — FORUM.** Where, on change of venue to another county, a person is tried and acquitted of crime on the ground of insanity and adjudged to be unsafe to be at large, it is the duty of the prosecuting attorney of the county in which the commitment was made to resist an application for his release, within Laws 1907, p. 33, § 6, providing for service of the application, in view of other provisions making the committing court the proper forum and such attorney the proper resisting officer in kindred proceedings; hence service of the application need not be made upon the prosecuting attorney of the county wherein the information was filed. *State ex rel. Thompson v. Snell*..... 177

INSANE PERSONS—CONTINUED.

2. SAME—PARTIES ENTITLED TO DISCHARGE—SCOPE OF ACT. Laws 1907, p. 33, relating to the confinement of the criminal insane, is not restricted to persons committed thereunder according to the terms of section 6, in view of section 9 extending its provisions to all criminal insane “now confined in the state hospitals for the insane” or in the penitentiary; hence the provisions for discharge from custody may be taken advantage of by one tried and committed before the act went into effect, and whether actually confined at that time or not; since when committed he was constructively confined, and since the act was intended to apply to all criminal insane, regardless of the time of their commitment or confinement. *State ex rel. Thompson v. Snell*..... 177
3. SAME—CONSTITUTIONAL LAW—EX POST FACTO LAWS—REMEDIES NOT PENAL. The requirement that the criminal insane shall obtain a certificate from the physician and permit from the warden of the penitentiary before making application for release is not unconstitutional as an *ex post facto* law, and invalid because imposing burdens that did not exist at the time of the commitment; since such laws are not penal and merely affect modes of procedure, to which the term *ex post facto* has no application. *State ex rel. Thompson v. Snell*
4. SAME—WHO MAY OBJECT TO. The state cannot urge the unconstitutionality of laws as being *ex post facto*, where the party elects to submit to the additional burdens imposed upon him thereby; as objection can only be made upon resistance to the law. *State ex rel. Thompson v. Snell*..... 177

INSOLVENCY:

See BANKRUPTCY.

Of fraudulent grantor, see FRAUDULENT CONVEYANCES.

INSTRUCTIONS:

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 33, 34.

In criminal prosecutions, see CRIMINAL LAW, 4.

In civil actions, see TRIAL, 9-15.

INTENT:

Evidence of intent of donor in making gift of land, see SPECIFIC PERFORMANCE, 4.

INTEREST:

1. INTEREST—MONEY PAID. In an action to recover money paid by mistake, interest is allowable from the time of demand made for specific amounts. *Moylan v. Moylan*..... 341

INTERSTATE COMMERCE:

See COMMERCE.

INTOXICATING LIQUORS:

- Conditions prohibiting sale on leased premises, rights of subtenant, see **LANDLORD AND TENANT**, 1, 2.
- Implied repeal of act to regulate or prohibit sale of liquors, see **STATUTES**, 9.
1. INTOXICATING LIQUORS—LICENSE—REPEAL. The authority to grant a liquor license for the purposes of regulation and revenue includes the power to refuse a license or to restrict sales to a certain locality. *State ex rel. Pasco v. Superior Court*..... 268
2. SAME—JUDICIAL REVIEW. The refusal of a liquor license by a town council is a legislative act not subject to judicial review or control. *State ex rel. Pasco v. Superior Court*..... 268
3. INTOXICATING LIQUORS—LICENSE—REVOCATION—REFUNDING FEE. Under Bal. Code, § 2935, providing that a liquor license shall be forfeited, in addition to other penalties provided by law, in case the licensee sells liquors to minors, a town council may, without repayment of any portion of the unearned fee, revoke a license upon conviction of the licensee of selling liquor to minors. *Krueger v. Colville* 295
4. SAME—FORFEITURE—CRIMINAL LAW—EXCESSIVE PENALTY. The forfeiture of a \$750 liquor license, in addition to a fine and liability upon a bond, is not unconstitutional as excessive penalty for selling intoxicating liquors to a minor. *Krueger v. Colville*..... 295
5. SAME—LICENSE—CONSTITUTIONAL LAW—DUE PROCESS. A license to sell intoxicating liquors is merely a temporary permit, and the forfeiture thereof for violation of law is not a deprivation of property without due process of law. *Krueger v. Colville*..... 295

ISSUES:

- Facts in issue and relevant to issues, see **EVIDENCE**, 2.
- Variance, see **PLEADING**, 7.
- Instructions to jury, see **TRIAL**, 12, 13.

JOINDER:

- Of causes of action, see **ACTION**.
- Of parties in action for joint trespass, see **TRESPASS**, 3.

JOINT TRESPASS:

- Joinder of parties in action for, see **TRESPASS**, 3.

JUDGES:

- See **COURT COMMISSIONERS**.
- Conduct of judge in civil trial, see **TRIAL**, 2, 3, 8.

1. JUDGES—QUALIFICATIONS—RESIDENCE—COURTS — JURISDICTION. It is not a valid objection to the jurisdiction of the superior court that the judge was not a resident of the county, the constitution not requiring a local judge in each county. *American Bonding Co. v. Dufur* 632

JUDGMENT:

- As fixing time for taking proceedings for review, see **APPEAL AND ERROR**, 11.
- Decision on appeal as law of the case on new trial in lower court, see **APPEAL AND ERROR**, 39, 40.
- Conclusiveness of dismissal in bankruptcy, see **BANKRUPTCY**.
- Form on allowing costs in supplemental proceedings, see **EXECUTION**.
- Form in action to enjoin acts already performed, see **INJUNCTION**, 2.
- Collateral attack on judgment and proceedings to condemn property for local improvement, see **MUNICIPAL CORPORATIONS**, 18, 19.
- Sufficiency of showing to entitle plaintiff to decree, see **QUIETING TITLE**, 2.
- Sale of land for nonpayment of tax, see **TAXATION**, 1, 3, 6-8.
1. **JUDGMENTS—RENDITION—TIME FOR.** A judgment is not void because not rendered within ninety days after the trial, nor does that of itself constitute reversible error. *Moylan v. Moylan* 341
2. **JUDGMENT—BY DEFAULT—TRIAL.** Where defendants were in default, and the court ordered judgment of default unless an answer should be filed showing a meritorious defense, and answers were filed showing no defense, the answers may be stricken and judgment of default entered. *American Bonding Co. v. Dufur* 632
3. **JUDGMENTS—NOTWITHSTANDING VERDICT—TRIAL.** A judgment for plaintiff notwithstanding a verdict for the defendant is properly entered where the plaintiff's case was established and defendant's evidence was too vague to constitute a defense. *Fishburne v. Robinson* 271
4. **JUDGMENT—ENTRY—HOLIDAYS.** A final judgment entered on a judicial day is not void by reason of the fact that prior proceedings were had in the case upon a legal holiday proclaimed by the governor, where no objection was made at the time to such prior proceedings. *State ex rel. Walter v. Superior Court* 1
5. **JUDGMENT—ENTRY—VALIDITY — PAYMENT OF FEES — APPEAL — FINALITY.** A judgment entered by the clerk immediately upon rendition of the verdict, pursuant to Laws 1903, p. 285, is not void because the fees required by Laws 1907, pp. 88-90, were not collected by the clerk; and failure to collect the fees does not affect the finality of the judgment for the purposes of appeal. *Chilcott v. Globe Nav. Co.* .. 302
6. **JUDGMENT—VACATION—RES JUDICATA—DENIAL OF VACATION—CONCLUSIVENESS.** Where a motion to vacate a judgment is denied on the ground that the motion was improper and the rights of the parties could not be adjudicated in such a proceeding, it is *res adjudicata* upon that question, although not made on the merits; and the court cannot grant a second motion to vacate based on the same grounds. *Pierce County v. Bunch* 599

FUTURE PAIN:

Measure of damages, see **DAMAGES**, 2.

GAMING:

Proceedings at trial constituting prejudicial error, see **APPEAL AND ERROR**, 34, 35.

Conviction of lesser offense, see **INDICTMENT AND INFORMATION**, 2.

1. **GAMING—SECURITY—INFORMATION—SUFFICIENCY.** Bal. Code, § 7260, prohibiting each and every person from dealing, carrying on, opening or conducting "either as owner, proprietor, employee, whether for hire or not," any game of . . . roulette . . . played for gain, is not limited to the conducting of public games, but includes games secretly carried on from which the public is excluded. *State v. Preston* 298
2. **SAME—CAPACITY OF PERSON IN GAME.** Under such section, "each and every person" is prohibited from gaming and it is not necessary to allege the capacity in which the game was conducted. *State v. Preston* 298
3. **GAMING—DEFENSES—OWNERSHIP OF MONEY LOST.** It is no defense to an action to recover money lost at gambling that the same was not the property of the plaintiff. *Crowley v. Taylor* 511

GAS:

Combination of companies for manufacture of, construction of city ordinance, see **CORPORATIONS**, 2.

GIFTS:

Specific performance of promise to convey land, see **SPECIFIC PERFORMANCE**, 3-5.

GRANTS:

Of public lands, see **PUBLIC LANDS**.

GUARANTY:

See **INDEMNITY**.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 30-38.

Exclusion of evidence to show condition and use of appliance after injury to servant, see **MASTER AND SERVANT**, 10.

HIGHWAYS:

Powers of deputy engineer to view and report, see **COUNTIES**, 1.

Defects in city streets, see **MUNICIPAL CORPORATIONS**, 25, 29.

1. **HIGHWAYS—ESTABLISHMENT BY PRESCRIPTION — EVIDENCE — SUFFICIENCY.** Adverse user sufficient to establish a public highway by prescription is not shown, where it appears that the way was first built as a skid road on private property for private logging pur-

HIGHWAYS—CONTINUED.

- poses, and afterwards used as a tram road for logging, and travel over it was similar to that over other logging roads generally regarded as private ways, and on the first claim to a public right, the owners erected gates and notices; since the use was only permissive in its character. *Stohltion v. Kitsap County* 305
2. **HIGHWAYS—ESTABLISHMENT—COLLUSION—EVIDENCE—ADMISSIBILITY.** Collusion between county commissioners and a railroad company in locating a proposed county road cannot be shown by the fact that the railroad company desired the location agreed to for its own purposes, where there was no evidence of improper influence or inducement. *State ex rel. Murhard Estate Co. v. Superior Court* 392
3. **SAME—EMINENT DOMAIN—REVIEW—COLLATERAL ATTACK—CONCLUSIVENESS.** The question of the necessity for taking certain land for the location of a county road cannot be collaterally attacked on certiorari to review the order of condemnation where no appeal or certiorari was taken from the order establishing the road, and the commissioners had jurisdiction. *State ex rel. Murhard Estate Co. v. Superior Court* 392
4. **HIGHWAYS—ABANDONMENT TO COUNTY—SALE TO RAILROAD—RIGHTS OF STATE—CONTROL.** Under Bal. Code, § 4338, authorizing a railroad company to appropriate any part of a public highway not within the limits of a municipal corporation, and providing that the county commissioners may agree upon the terms of the appropriation, county commissioners may sell to a railroad company a road which it had taken possession of and destroyed as a highway; and mandamus will not lie at the instance of the state to compel the county to oust the company and keep the road open, although the road was constructed in part with funds received from the state, where it would have been impracticable to keep the road in repair, the commissioners had constructed another road to take its place, and it appears that they were charged with the control of the road, and exercised their best judgment in the matter. *State ex rel. Atkinson v. Dunlap* 385

HOLIDAYS:

Proceedings on as affecting entry of judgment, see JUDGMENT, 4.

HOMESTEAD:

Possession and claim of exemption during period of redemption, see MORTGAGES, 1-3.

HUSBAND AND WIFE:

Divorce and judicial separation, see DIVORCE.

Estoppel of wife to assert title to community property, see ESTOPPEL.

HUSBAND AND WIFE—CONTINUED.

1. **HUSBAND AND WIFE—CONVEYANCES BETWEEN—COMMUNITY PROPERTY—SEPARATE PROPERTY OF HUSBAND.** Under Bal. Code, § 4539, providing that a deed from a husband or wife to the other shall divest the grantor of any community interest and create a separate estate in the grantee, property acquired by and in the possession of a husband becomes his separate property upon his wife's making a quitclaim deed thereof to him, although he subsequently proceeded to remove clouds from the title by purchasing tax titles and other interests, where such steps and the quitclaim deed were all parts of one transaction whereby the husband, living separate and apart from the wife, sought and claimed to acquire a separate estate. *Hayden v. Zerbst*..... 103
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—LEASES—EXECUTION.** A lease of community property is invalid where it was executed by the husband alone, and the wife did not authorize or assent thereto or acquiesce therein. *Ryan v. Lambert*..... 649
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—SALE BY HUSBAND—ASSENT OF WIFE—ESCROWS—EVIDENCE—SUFFICIENCY.** In an action to compel the specific performance of an escrow agreement to deliver a deed for community lands, the fact that the wife called and signed the deed while in escrow is sufficient evidence that she knew of and assented to the terms of the sale. *Manning v. Foster*.... 541

IGNORANCE:

Of physician as defense in action for malpractice, see PHYSICIANS AND SURGEONS, 2.

IMPEACHMENT:

Of witness, see WITNESSES, 5.

IMPLIED REPEAL:

Of statute or ordinance, see STATUTES, 7-9.

IMPROVEMENTS:

Necessity and sufficiency to constitute adverse possession, see ADVERSE POSSESSION, 3.

Public improvements, see MUNICIPAL CORPORATIONS.

INCOMPETENCY:

Of servants, see MASTER AND SERVANT, 5, 13.

INCOMPETENT PERSONS:

See INSANE PERSONS.

INCONSISTENT DEFENSES:

See PLEADING, 2.

INDEBTEDNESS:

Of municipality, constitutional limitation, see MUNICIPAL CORPORATIONS, 32-34.

INDEMNITY:

Bonds on appeal, see **APPEAL AND ERROR**, 9, 10.
 Against mechanic's lien, see **MECHANICS' LIENS**.

1. INDEMNITY—CONTRACT—ACTIONS — PLEADING — ANSWER — SUFFICIENCY. An answer in an action upon a contract to indemnify a surety company from liability on a forthcoming bond given for the defendants, is insufficient where there was no denial of the execution of the bond, or of the recovery of the judgment thereon against the plaintiff, or of the payment of the judgment, or of notice to the defendants to appear and defend the action on the bond, or any allegation of fraud, payment or other defense. *American Bonding Co. v. Dufur*..... 632
2. INDEMNITY—CONTRACTS OF — ACTIONS — DEFENSES—COMPENSATION FOR EXECUTING BOND. It is no defense to an action to indemnify a surety company on a contract from liability on a forthcoming bond, that the defendants had compensated the surety company by payment of \$15 as consideration for executing the bond, where defendants had especially contracted with the surety company to hold it harmless from damages of any kind. *American Bonding Co. v. Dufur*
3. SAME—CONTRACTS OF—ATTORNEY'S FEES AS DAMAGES. In an action on a contract to indemnify a surety company from liability on a bond given, an attorney's fee for prosecuting the action may be allowed as part of the damages, where the contract provides for the payment of such an attorney's fee. *American Bonding Co. v. Dufur*

INDICTMENT AND INFORMATION:

See **FALSE PRETENSES**.

Offenses against laws against gambling, see **GAMING**.

1. INDICTMENT AND INFORMATION—LESSER DEGREES OF OFFENSE—LARCENY. Upon a charge of larceny from the person, defendant may be convicted of petit larceny, as the same is but a lesser degree of the same offense. *State v. Clem*..... 273
2. INFORMATION—DEGREES—CONVICTION—OF LESSER OFFENSE — GAMING. The misdemeanor of dealing, carrying on, opening, or conducting, either as owner, proprietor, or employee, whether for hire or not, any game of . . . roulette . . . as defined by Bal. Code, § 7260, is necessarily included in the felony of conducting, carrying on, opening or causing to be opened, either as owner, proprietor, employee or assistant, whether for hire or not, any game of . . . roulette . . . in any house where persons resort for the purpose of playing any such game, as defined by Laws 1903, p. 63; and a conviction of the former may be had under an information for the latter offense, charging the conducting of a gambling resort by conducting and carrying on a game of roulette in a place where persons resort for that purpose. *State v. Preston*..... 298

INDORSEMENT:

Of bill or promissory note, see **BILLS AND NOTES**.

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

INJUNCTION:

Restraining removal of timber upon rescission of contract for mutual mistake, see **CONTRACTS**, 4.

Right of subtenant to enjoin violation of conditions as to use of part of building, see **LANDLORD AND TENANT**, 2.

To restrain compromise by council of claim in favor of town, see **MUNICIPAL CORPORATIONS**, 36.

Obstruction on navigable lake, riparian or littoral rights, see **NAVIGABLE WATERS**, 2.

To restrain disposition of partnership property, in action for accounting, see **PARTNERSHIP**, 7.

Trespass on railway right of way by rival company, conflict in location, see **RAILROADS**, 1.

1. **INJUNCTION — AGAINST TRESPASS — ADEQUACY OF DAMAGES.** The lessee of state tide lands may maintain an action to enjoin continuing trespasses by persons who go thereon at low tide to dig clams and destroy the clam beds, a judgment for damages not affording adequate compensation. *Sequim Bay Canning Co. v. Bugge*..... 127

2. **INJUNCTIONS — RELIEF — ACTS ALREADY PERFORMED — JUDGMENT — FORM — PLEADINGS — AMENDMENT.** In an action to enjoin the council and officers of a town from compromising and satisfying a judgment, a judgment enjoining the acts is irregular where it appears that the acts have already been performed; and the court should, on its appearing that the plaintiff is entitled to relief, give judgment setting aside the compromise and satisfaction, allowing the pleadings to be, or considering them, amended to conform to the proofs. *Farnsworth v. Wilbur*..... 416

INSANE PERSONS:

1. **INSANE PERSONS — CONFINEMENT OF INSANE CRIMINALS — DISCHARGE — PROCEEDINGS — NOTICE OF APPLICATION — FORUM.** Where, on change of venue to another county, a person is tried and acquitted of crime on the ground of insanity and adjudged to be unsafe to be at large, it is the duty of the prosecuting attorney of the county in which the commitment was made to resist an application for his release, within Laws 1907, p. 33, § 6, providing for service of the application, in view of other provisions making the committing court the proper forum and such attorney the proper resisting officer in kindred proceedings; hence service of the application need not be made upon the prosecuting attorney of the county wherein the information was filed. *State ex rel. Thompson v. Snell*..... 177

INSANE PERSONS—CONTINUED.

2. SAME—PARTIES ENTITLED TO DISCHARGE—SCOPE OF ACT. Laws 1907, p. 33, relating to the confinement of the criminal insane, is not restricted to persons committed thereunder according to the terms of section 6, in view of section 9 extending its provisions to all criminal insane “now confined in the state hospitals for the insane” or in the penitentiary; hence the provisions for discharge from custody may be taken advantage of by one tried and committed before the act went into effect, and whether actually confined at that time or not; since when committed he was constructively confined, and since the act was intended to apply to all criminal insane, regardless of the time of their commitment or confinement. *State ex rel. Thompson v. Snell*..... 177
3. SAME—CONSTITUTIONAL LAW—Ex POST FACTO LAWS—REMEDIES NOT PENAL. The requirement that the criminal insane shall obtain a certificate from the physician and permit from the warden of the penitentiary before making application for release is not unconstitutional as an *ex post facto* law, and invalid because imposing burdens that did not exist at the time of the commitment; since such laws are not penal and merely affect modes of procedure, to which the term *ex post facto* has no application. *State ex rel. Thompson v. Snell*
4. SAME—WHO MAY OBJECT To. The state cannot urge the unconstitutionality of laws as being *ex post facto*, where the party elects to submit to the additional burdens imposed upon him thereby; as objection can only be made upon resistance to the law. *State ex rel. Thompson v. Snell*..... 177

INSOLVENCY:

See BANKRUPTCY.

Of fraudulent grantor, see FRAUDULENT CONVEYANCES.

INSTRUCTIONS:

- Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 33, 34.
- In criminal prosecutions, see CRIMINAL LAW, 4.
- In civil actions, see TRIAL, 9-15.

INTENT:

- Evidence of intent of donor in making gift of land, see SPECIFIC PERFORMANCE, 4.

INTEREST:

1. INTEREST—MONEY PAID. In an action to recover money paid by mistake, interest is allowable from the time of demand made for specific amounts. *Moylan v. Moylan*..... 341

INTERSTATE COMMERCE:

See COMMERCE.

INTOXICATING LIQUORS:

Conditions prohibiting sale on leased premises, rights of subtenant, see **LANDLORD AND TENANT**, 1, 2.

Implied repeal of act to regulate or prohibit sale of liquors, see **STATUTES**, 9.

1. **INTOXICATING LIQUORS—LICENSE—REPEAL.** The authority to grant a liquor license for the purposes of regulation and revenue includes the power to refuse a license or to restrict sales to a certain locality. *State ex rel. Pasco v. Superior Court*..... 268
2. **SAME—JUDICIAL REVIEW.** The refusal of a liquor license by a town council is a legislative act not subject to judicial review or control. *State ex rel. Pasco v. Superior Court*..... 268
3. **INTOXICATING LIQUORS—LICENSE—REVOCATION—REFUNDING FEE.** Under Bal. Code, § 2935, providing that a liquor license shall be forfeited, in addition to other penalties provided by law, in case the licensee sells liquors to minors, a town council may, without repayment of any portion of the unearned fee, revoke a license upon conviction of the licensee of selling liquor to minors. *Krueger v. Colville* 295
4. **SAME—FORFEITURE—CRIMINAL LAW—EXCESSIVE PENALTY.** The forfeiture of a \$750 liquor license, in addition to a fine and liability upon a bond, is not unconstitutional as excessive penalty for selling intoxicating liquors to a minor. *Krueger v. Colville*..... 295
5. **SAME—LICENSE—CONSTITUTIONAL LAW—DUE PROCESS.** A license to sell intoxicating liquors is merely a temporary permit, and the forfeiture thereof for violation of law is not a deprivation of property without due process of law. *Krueger v. Colville*..... 295

ISSUES:

Facts in issue and relevant to issues, see **EVIDENCE**, 2.

Variance, see **PLEADING**, 7.

Instructions to jury, see **TRIAL**, 12, 13.

JOINDER:

Of causes of action, see **ACTION**.

Of parties in action for joint trespass, see **TRESPASS**, 3.

JOINT TRESPASS:

Joinder of parties in action for, see **TRESPASS**, 3.

JUDGES:

See **COURT COMMISSIONERS**.

Conduct of judge in civil trial, see **TRIAL**, 2, 3, 8.

1. **JUDGES—QUALIFICATIONS—RESIDENCE—COURTS—JURISDICTION.** It is not a valid objection to the jurisdiction of the superior court that the judge was not a resident of the county, the constitution not requiring a local judge in each county. *American Bonding Co. v. Dufur* 632

JUDGMENT:

- As fixing time for taking proceedings for review, see **APPEAL AND ERROR**, 11.
- Decision on appeal as law of the case on new trial in lower court, see **APPEAL AND ERROR**, 39, 40.
- Conclusiveness of dismissal in bankruptcy, see **BANKRUPTCY**.
- Form on allowing costs in supplemental proceedings, see **EXECUTION**.
- Form in action to enjoin acts already performed, see **INJUNCTION**, 2.
- Collateral attack on judgment and proceedings to condemn property for local improvement, see **MUNICIPAL CORPORATIONS**, 18, 19.
- Sufficiency of showing to entitle plaintiff to decree, see **QUIETING TITLE**, 2.
- Sale of land for nonpayment of tax, see **TAXATION**, 1, 3, 6-8.
1. JUDGMENTS—RENDITION—TIME FOR. A judgment is not void because not rendered within ninety days after the trial, nor does that of itself constitute reversible error. *Moylan v. Moylan*..... 341
2. JUDGMENT—BY DEFAULT—TRIAL. Where defendants were in default, and the court ordered judgment of default unless an answer should be filed showing a meritorious defense, and answers were filed showing no defense, the answers may be stricken and judgment of default entered. *American Bonding Co. v. Dufur*..... 632
3. JUDGMENTS—NOTWITHSTANDING VERDICT—TRIAL. A judgment for plaintiff notwithstanding a verdict for the defendant is properly entered where the plaintiff's case was established and defendant's evidence was too vague to constitute a defense. *Fishburne v. Robinson* 271
4. JUDGMENT—ENTRY—HOLIDAYS. A final judgment entered on a judicial day is not void by reason of the fact that prior proceedings were had in the case upon a legal holiday proclaimed by the governor, where no objection was made at the time to such prior proceedings. *State ex rel. Walter v. Superior Court*..... 1
5. JUDGMENT—ENTRY—VALIDITY — PAYMENT OF FEES — APPEAL — FINALITY. A judgment entered by the clerk immediately upon rendition of the verdict, pursuant to Laws 1903, p. 285, is not void because the fees required by Laws 1907, pp. 88-90, were not collected by the clerk; and failure to collect the fees does not affect the finality of the judgment for the purposes of appeal. *Chilcott v. Globe Nav. Co.* 302
6. JUDGMENT—VACATION—RES JUDICATA—DENIAL OF VACATION—CONCLUSIVENESS. Where a motion to vacate a judgment is denied on the ground that the motion was improper and the rights of the parties could not be adjudicated in such a proceeding, it is *res adjudicata* upon that question, although not made on the merits; and the court cannot grant a second motion to vacate based on the same grounds. *Pierce County v. Bunch* 599

JUDGMENT—CONTINUED.

7. JUDGMENT—COLLATERAL ATTACK—GROUNDS—WANT OF SERVICE. Where it is admitted that none but a void service of a summons by publication was made in a tax foreclosure, the judgment is void and may be attacked in an action to set it aside, although it recited that due service was made. *Bauer v. Widholm*..... 310
8. JUDGMENT—BAR—RES JUDICATA—SPLITTING CAUSES—JUDGMENT ON MERITS. The dismissal of an action on contract upon objection that the complaint did not state a cause of action, because the contract was an illegal one by a corporation to traffic in its own stock, is *res judicata* of another action between the same parties to recover on the same contract, omitting the illegal portion of the contract referring to the traffic in the corporate stock, where it appears that the contract was an indivisible one; since a final judgment on demurrer that goes to the ground of recovery is a judgment on the merits; and letters referred to in the second action do not affect the matter where they related to the subject-matter of the original contract and do not constitute an independent basis for a cause of action. *Brechlin v. Night Hawk Mining Co.*..... 198

JUDICIAL NOTICE:

As to difference in mortality tables, see DAMAGES, 10.
Of city ordinance in prosecution for violation of ordinance, see MUNICIPAL CORPORATIONS, 1.

JUDICIAL POWER:

See CONSTITUTIONAL LAW, 1.

JURISDICTION:

Amount in controversy, see APPEAL AND ERROR, 2.
Dismissal in bankruptcy precluding further prosecution in state courts, see BANKRUPTCY.
Particular courts, see COURTS.
To review assessments for public improvements, see MUNICIPAL CORPORATIONS, 17.
In proceedings for local improvements, see MUNICIPAL CORPORATIONS, 5, 17-19.

JURY:

Questions for jury in civil actions, see TRIAL, 7
Instructions in civil actions, see TRIAL, 9-15.

JUSTIFICATION:

Of actionable words, see LIBEL AND SLANDER, 3.

KNOWLEDGE:

- Servant's knowledge of defect or danger as element of assumption of risk by servant, see **MASTER AND SERVANT**, 6, 14.
Of ownership of property in publishing summons in foreclosure proceeding, see **TAXATION**, 4.
Want of owner's knowledge of tax as ground for vacation of tax title, see **TAXATION**, 5.

LACHES:

- As affecting invalidity of contract obtained by fraud, see **CONTRACTS**, 1.
Constituting estoppel to assert title, see **ESTOPPEL**.
Delay as defeating right to make reassessment for local improvement, see **MUNICIPAL CORPORATIONS**, 20.
Of partner in demanding accounting for profits, see **PARTNERSHIP**, 6.

LAKES:

- Navigability of, see **NAVIGABLE WATERS**, 1.

LANDLORD AND TENANT:

Cancellation of leases on ground of fraud and incapacity, see **CANCELLATION OF INSTRUMENTS**, 3.

Lease of community property, execution by husband alone, see **HUSBAND AND WIFE**, 2.

Ownership by lessee of clams on leased tide lands, see **PUBLIC LANDS**, 2, 4.

1. **LANDLORD AND TENANT—LEASE—CONDITIONS—SALE OF LIQUOR—RIGHT OF SUBTENANT TO ENFORCE.** A stipulation in a lease prohibiting the sale by the lessee of intoxicating liquors on the premises, and providing that the lease may be cancelled for violation of such clause, cannot be taken advantage of by a subtenant of part of the premises against the lessee and his other subsequent subtenants, where the first sublease did not provide against such sale in the other portions of the premises afterwards sublet; since the stipulation was a condition subsequent which could be waived, or only taken advantage of, by the original lessors, the objecting subtenants not being parties to the lease in question. *Beebe v. Tyra*..... 157

2. **SAME—INJUNCTION—ESTOPPEL.** A subtenant of part of leased premises is estopped to maintain a suit to enjoin the use of other portions thereof for saloon purposes, contrary to a provision running with the leased land, where the saloon was fitted up at great expense and allowed to run eleven months, during which time the saloon property changed hands several times, without any other objection than a letter, written before the saloon sublease was made, notifying the parties thereto of the stipulation in the lease prohibiting the sale of intoxicating liquors on the premises, and that the writers would hold the parties responsible for all damages if the terms of the lease were broken; since such equitable action must be seasonably commenced. *Beebe v. Tyra*..... 157

LANDLORD AND TENANT—CONTINUED.

3. **LANDLORD AND TENANT—VOID LEASE—ESTATE CREATED.** Where a lease for the period of ten years, with monthly rent reserved, is invalid, the lessees become tenants from month to month. *Ryan v. Lambert* 649

LANDS:

See PUBLIC LANDS.

LARCENY:

Conviction of lesser degrees of offense, see INDICTMENT AND INFORMATION, 1.

LAW OF THE CASE:

Decision on appeal, see APPEAL AND ERROR, 39, 40.

LEASES:

See LANDLORD AND TENANT.

LEVY:

Of assessments for local improvement, see MUNICIPAL CORPORATIONS, 11, 13-16.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—WORDS ACTIONABLE PER SE—IMPUTING CRIME.** It is actionable slander *per se* to say of a man that he "has another wife back east," as the words in effect charge bigamy. *Bleitz v. Carton* 545
2. **SAME.** It is not actionable *per se* to utter orally that a man is not fit to associate with other people and has been in jail two or three years back east. *Bleitz v. Carton* 545
3. **SAME—JUSTIFICATION—PRIVILEGED COMMUNICATIONS—EVIDENCE.** A conditional statement charging a man with bigamy "if what Mr. D. tells me is true," made by a member of a fraternal order, of and respecting an applicant for membership, and made to a member of the order while the applicant's reputation was under investigation for the purpose of showing his unfitness, is a privileged communication for which damages cannot be recovered, where D. had told the defendant that plaintiff (who had a wife and children here) "had another wife and children in Illinois" and had communicated to the defendant circumstances known to D. back east from which it appears that the plaintiff was not a bigamist, but had secured a divorce from his first wife, that he had been charged with perjury in so doing, had settled the matter by giving notes to her, and had paid only one of the notes. *Bleitz v. Carton* 545

LIBEL AND SLANDER—CONTINUED.

4. SAME—PLEADING—VARIANCE. In an action for slander in uttering of a man that he has “another wife and child back east,” in effect charging him with the crime of bigamy, it is a fatal variance to prove that “he has a wife and child back east and is living with another woman here,” which would only constitute the crime of adultery; since the old rule that in slander a variance is fatal has not been relaxed to such an extent as to allow allegation as to one crime and proof of another. *Bleitz v. Carton*..... 545
5. SAME—FAILURE OF PROOF. In an action for slander in charging a man with being a bigamist, proof that he did not actually call him a bigamist but said he had a wife back east and was living with another woman here, is not only a total failure of proof, but amounts to a positive denial of the allegation. *Bleitz v. Carton*..... 545
6. SAME—VARIANCE—BILL OF PARTICULARS. Where, in an action for slander, a bill of particulars was furnished showing when and before whom the words were spoken, the plaintiff is not entitled to show that the words were spoken at other times and places; and such proof, introduced for the purpose of showing malice, will not support a verdict where the complaint was not amended. *Bleitz v. Carton* 545
7. SAME—PLEADING—ANSWER—ADMISSIONS — JUSTIFICATION. Where the complaint in an action for slander alleged the uttering of a positive charge of bigamy, a justification in the answer admitting that the words were uttered conditionally, i. e., “If what Mr. D. has told me is true,” is not inconsistent with a general denial, and does not admit the allegation of the complaint. *Bleitz v. Carton*.... 545
8. SAME—VARIANCE. Proof of a conditional statement of slanderous words does not support an allegation of a positive or direct statement. *Bleitz v. Carton*..... 545
9. LIBEL AND SLANDER—TRIAL—INSTRUCTIONS—ASSUMPTIONS — COMMENT ON FACTS. An instruction in an action for slander upon the subject of justification, “if the jury should find that the defendant was provoked to speak the slanderous words,” to which the court added that it was based “on the assumption that you find the words were uttered,” is not objectionable as assuming that the words were uttered, or as an unlawful comment on the facts. *Childs v. Childs*, 27
10. LIBEL AND SLANDER—DAMAGES—EXCESSIVE VERDICT. A verdict for \$750 for slander by the utterance in a public street in the presence of numerous persons, of words questioning the chastity of a woman is not excessive. *Childs v. Childs*..... 27

LICENSES:

Annual corporation tax, see CORPORATIONS, 1.

Sale of intoxicating liquors, see INTOXICATING LIQUORS.

LIENS:

On logs, see LOGS AND LOGGING.
Liens of mechanics and materialmen, see MECHANICS' LIENS.
Of assessment for public improvements, see MUNICIPAL CORPORATIONS, 21-24.
Right of buyer to hold goods pending payment of advances, see SALES, 5.

LIMITATION:

Of assessments for benefits from local improvement, see MUNICIPAL CORPORATIONS, 13-15, 20.
Of indebtedness and expenditures of municipality, see MUNICIPAL CORPORATIONS, 32-34.

LIMITATION OF ACTIONS:

See ADVERSE POSSESSION.
Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 11.
Enforcement of lien for special improvement assessment, see MUNICIPAL CORPORATIONS, 22, 23.

LIQUORS:

See INTOXICATING LIQUORS.

LITTORAL RIGHTS:

See NAVIGABLE WATERS.

LOCAL ASSESSMENTS:

For local improvements, see MUNICIPAL CORPORATIONS, 4, 9-18, 20-24.

LOCATION:

Of railroad, see RAILROADS, 1.

LOGS AND LOGGING:

1. LOGS AND LOGGING—LIENS—AGENT OF OWNER—STATUTES—CONSTRUCTION. A person getting out logs and piling under a contract with the owner is an agent of the owner, within the meaning of Bal. Code, § 5930, giving a lien thereon in favor of certain persons rendering services at the instance of the owner or his agent. *O'Brien v. Perfection Pile Preserving Co.*..... 395
2. SAME—LIEN—SERVICES INCLUDED. The lien given by Bal. Code, § 5930, in favor of every person performing labor or assisting in obtaining timber products, extends to hauling logs and piles before being worked into a finished product, and is not restricted to railroads and steamboats by the clause giving such carriers liens for hauling or towing. *O'Brien v. Perfection Pile Preserving Co.*.... 395

LOGS AND LOGGING—CONTINUED.

3. **LOGS AND LOGGING—LIENS—FINISHED PRODUCT.** Contractors getting out logs, at so much per thousand feet, for immediate manufacture into lumber by the owner, are entitled to a lien upon the finished product, under Bal. Code, § 5931, giving a lien for services rendered in the manufacture of logs into lumber, and are not confined to a lien upon the logs given by Bal. Code, § 5930. *O'Connor v. Burnham* 443
4. **SAME—ELOIGNMENT.** Where the logs were at all times owned by one who manufactured them into lumber, the owner cannot defeat a lien on the logs by claiming that he was only liable as an eloignier, where the statute gave a lien on the finished product to any one rendering services on the logs. *O'Connor v. Burnham*..... 443
5. **SAME—PERFORMANCE OF CONTRACT.** One claiming a lien on logs under a contract to cut certain timber at \$4 per thousand, payable monthly as delivered, is justified in ceasing to work upon the owner's refusal to make payments agreed upon. *O'Connor v. Burnham*.. 443

LUMBER:

See **LOGS AND LOGGING.**

LUNATICS:

See **INSANE PERSONS.**

MACHINERY:

Sale of, see **SALES**, 3, 4, 6.

MAJORITY:

Votes authorizing township organization, see **ELECTIONS**.

MALPRACTICE:

By physicians, see **PHYSICIANS AND SURGEONS.**

MANDAMUS:

Appealability of judgment in mandamus as dependent on amount in controversy, see **APPEAL AND ERROR**, 2.

To compel county to keep road open, see **HIGHWAYS**, 4.

MASTER AND SERVANT:

Liability of carrier for ejection of passenger by servant, see **CARRIERS**, 8-10.

Conclusions as evidence of warning to servant, see **EVIDENCE**, 7.

Necessity of pleading laws of other state, see **STATUTES**, 11.

1. **MASTER AND SERVANT—GUARDING MACHINERY—NOTICE BY SERVANT—FACTORY ACT.** The failure of an employee to give notice of the unguarded condition of a saw does not, under the factory act, preclude a recovery, since the object of the notice is simply to secure an inspection thereof by the commissioner of labor. *McIntosh v. Saw Mill Phoenix* 152

MASTER AND SERVANT—CONTINUED.

2. **SAME—NATURE OF “GUARD”—REQUIREMENTS OF FACTORY ACT—INSTRUCTIONS.** Where an operator was injured by the cutting of his hand on a hand-fed rotary ripsaw, which was not guarded, and there was evidence that a self-feeding apparatus had previously been in use on the machine and would have avoided the danger, it is error to refuse to give an instruction that the self-feeding apparatus, which made a radical change in the operation of the saw, is not such a guard for a hand-fed saw as is contemplated by the factory act requiring saws to be guarded. *McIntosh v. Saw Mill Phoenix*... 152
3. **MASTER AND SERVANT—FELLOW SERVANTS—POWDERMAN AND COMMON LABORER—VICE PRINCIPALS—WARNING.** A foreman and “powder” man engaged in blasting and drilling operations at the top of a cut in railroad construction work are not fellow servants of one employed in the cut below as a common laborer in shoveling rock and earth into cars; and the former represent the master and are bound to give notice to laborers in places made dangerous by their work. *Ongaro v. Twohy*..... 93
4. **SAME—ASSUMPTION OF RISKS.** Employees working in the proximity of blasting operations on railroad construction work do not assume the risk of the negligence of a shift boss and “powder” man in using a steel rod to tamp dynamite into a hole, where such operation was extra dangerous and likely to cause a premature explosion. *Ongaro v. Twohy*..... 93
5. **SAME—ASSUMPTION OF RISKS—INCOMPETENT FELLOW SERVANT.** A hook tender does not, as a matter of law, assume the risk from the incompetency of the engineer of a donkey engine, where the engineer had worked but a few hours and was not known to the hook tender, whose duties in the main called him to a place where he could not carefully observe the engineer’s manner of work. *Seewald v. Harding Lumber Co.*..... 655
6. **MASTER AND SERVANT—INJURIES TO SERVANT—KNOWLEDGE OF DANGER—EVIDENCE—QUESTION FOR JURY.** The positive statements of an employee that he did not know of the danger from an effort being made to raise a water gate, are not overcome by proof of minor facts which he might have noticed and indicating to him that such attempt was being made, considering his position and the roar of the water, and the question is therefore for the jury. *Harris v. Washington Portland Cement Co.*..... 345
7. **MASTER AND SERVANT—PERSONAL INJURIES—SAFE PLACE—ASSUMPTION OF RISKS—EVIDENCE—SUFFICIENCY.** An employee in the construction of a building, struck by a falling brick, assumes the risk as a matter of law, where it appears that while he would be engaged in putting a wheelbarrow of brick on one elevator at the bottom of the shaft, another employee at the top of the shaft would be removing another load from the other elevator, that he knew that bricks

MASTER AND SERVANT—CONTINUED.

- were liable to be jostled off from the load and fall down the shaft, and a brick was jostled and fell, the elevator platform not being flush with the upper floor. *Kelly v. Cowan*..... 606
8. **SAME—OILING MACHINERY IN MOTION—CUSTOM.** An employee is not guilty of contributory negligence in attempting to oil a shaft without stopping the machinery in a shingle mill where it was not customary and he had been instructed not to do so. *Ramm v. Hewitt-Lea Lumber Co.*..... 263
9. **MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SAFE PLACE—LIGHTS—DUTY TO DISCOVER DANGER—VICE PRINCIPALS.** An experienced electrician, who received a shock from highly charged wires while superintending the removal of a burned out transformer in a power house, is guilty of contributory negligence, as a matter of law, where it appears from his testimony that he went upon a cross-arm four or five feet below the ceiling, that he was standing over three high tension wires known to him to be carrying a heavy load, and from which there were small wires or lightning arresters leading through the roof which were commonly found in all power houses, that he came in contact with the small wires, and that it was too dark in that place for him to see the small wires; since it was recklessness to go into a dark place where he knew there were dangerous wires and might be others, there being no direction or necessity that he do so, and since he was in charge as a vice principal and was bound to see to the safety of the place. *Woeiflen v. Lewiston-Clarkston Co.*..... 405
10. **MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE—ADMISSIBILITY—APPEAL—REVIEW—HARMLESS ERROR.** In an action for personal injuries sustained through an alleged defective swamp hook and lead line, it is competent for the defendant to show that the hook and line were, while in the same condition, used several days after the injury in the same work, and worked perfectly; but its exclusion is not prejudicial error where there was testimony that the same had been used in the same way for eighteen months prior to the accident. *Hoseth v. Preston Mill Co.*..... 682
11. **MASTER AND SERVANT—NEGLIGENCE—OPERATION OF RAILROAD—DEFECTIVE COUPLING—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.** The questions of negligence of the defendant and contributory negligence of the deceased and his assumption of risks, are primarily for the jury, and a verdict for plaintiffs, upheld by the trial court on motion for new trial, cannot be disturbed by the appellate court, where there was evidence that a coupling between the tender of a logging engine and a car was defective and that the defect could have been discovered by reasonable inspection; that in backing a train of cars up a grade, the coupling broke, and the deceased, a fireman, who was standing on the foot board for the purpose of

MASTER AND SERVANT—CONTINUED.

- applying sand to the rails, was caught and crushed between the tender and the logs on the car, it being ruleable for him to do so when sand was necessary; although the place was known to be a dangerous place, and the engineer had not ordered the sand. *Gauthier v. Wood & Iverson*..... 8
12. MASTER AND SERVANT—GUARDING MACHINERY—UNGUARDED SET SCREW—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. Whether a set screw might have been advantageously guarded under the factory act, negligence in failing to do so, assumed risks and contributory negligence, are questions for the jury, where it appears that an employee first attempted to apply oil from in front, reaching around a timber, when the pulley threw dust into his eyes, whereupon he passed to a position back of the timber and was caught on an unprotected set screw on the pulley, there being evidence that his usual work was on the floor below, that he had never been there before, and that the set screw might have been advantageously guarded, and the evidence as to his contributory negligence was conflicting. *Ramm v. Hewitt-Lea Lumber Co.*..... 263
13. MASTER AND SERVANT—NEGLIGENCE—EMPLOYMENT OF INCOMPETENT CO-SERVANT—EVIDENCE—QUESTION FOR JURY. The question of the negligence of a master in employing an incompetent engineer to run a donkey engine, used in hauling logs by a cable, is for the jury, where it appears that the engineer was a young man, about nineteen years of age, sent out by an employment office the evening before, that he was nervous and excited in attempting to operate the engine, and caused injury to the hook tender by starting the engine at full speed when directed to start it slowly; it being the master's duty to make a reasonable effort to learn his qualifications. *Seewald v. Harding Lumber Co.*..... 655
14. MASTER AND SERVANT—SAFE APPLIANCES—KNOWN DANGERS—INSTRUCTIONS AS TO CORRESPONDING DUTIES—TRIAL—INSTRUCTIONS AS A WHOLE. It is not prejudicial error in an action for injuries sustained by a signalman in a logging camp, through the breaking of a swamp hook, to instruct that the master and servant do not stand upon a footing of equality as to the knowledge of danger, where the instruction is immediately followed by full and proper instructions as to the corresponding duties of the parties which, taken as a whole, were favorable to appellant. *Hoseth v. Preston Mill Co.*..... 682
15. SAME—CONTRIBUTORY NEGLIGENCE—UNSAFE METHODS—INSTRUCTIONS. It is proper to refuse a requested instruction that a servant is guilty of contributory negligence if he assumes an unsafe method of performing an act, when there were one or more safe methods that he might have adopted, where the evidence shows that he had no knowledge or means of knowledge of the unsafety of the course pursued; since the instruction is too broad. *Ramm v. Hewitt-Lea Lumber Co.*..... 263

MASTER AND SERVANT—CONTINUED.

16. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—RELEVANCY.** An instruction that plaintiff cannot recover if he voluntarily adopts an unsafe method where there was a safe way, need be given only where there are obviously two ways of doing the act. *Harris v. Washington Portland Cement Co.*..... 345

MEANDERED WATERS:

See **BOUNDARIES**, 2.

MEASURE OF DAMAGES:

See **DAMAGES**, 2.

MECHANICS' LIENS:

Remedies of contractor for extra work, see **CONTRACTS**, 6.

Liens on logs and lumber, see **LOGS AND LOGGING**.

1. **MECHANICS' LIENS—INDEMNITY AGAINST CLAIMS—CONTRACT—CONSTRUCTION—CLAIMS ALLOWED.** In an action upon an agreement by a surety company to hold the owner of a building free from any claims for materials furnished or used in the building, the plaintiff may show the claims for materials furnished and used of parties joined as defendants, although they did not appear in the action. *Exposition Amusement Co. v. Empire State Surety Co.*..... 637
2. **SAME.** In such an action, it is error to allow the plaintiff to recover for a defective roof that did not comply with the contract, placed by a subcontractor, and to allow a lien to the contractor therefor, where the architect properly rejected the same and a new roof was put on and the cost thereof charged against the defendant; and it would be immaterial that the contractor consented to allow charges for the two roofs, after the work was taken from him. *Exposition Amusement Co. v. Empire State Surety Co.*..... 637
3. **MECHANICS' LIENS—INDEMNITY AGAINST CLAIMS—CONTRACTS—CONSTRUCTION.** Where a surety company undertakes to complete a building after the contractor's default, and in consideration of the waiver of accrued stipulated damages for delay, "waives any and all objections it may have," and agrees to immediately complete the building, it cannot object to departures in the performance of the original contract during the performance of the work by the contractor. *Exposition Amusement Co. v. Empire State Surety Co.*.. 637
4. **SAME—DEFENSES—SETTLEMENT.** It is no defense to an action upon a contract to indemnify against all claims, entered into by a surety completing a building, that a settlement made between the owner, architect and defaulting contractor was made without notice to the surety, when the surety was not held bound by the settlement and was allowed to contest the same. *Exposition Amusement Co. v. Empire State Surety Co.*..... 637

MEMORANDA:

Required by statute of frauds, see **FRAUDS, STATUTE OF**, 1.

METHOD:

Of valuation for purpose of levying assessment for local improvements, see **MUNICIPAL CORPORATIONS**, 14, 15.

METHOD OF WORK.

Adoption of unsafe method as constituting contributory negligence, see **MASTER AND SERVANT**, 15-16.

MISCONDUCT:

Of counsel or party ground for new trial, see **NEW TRIAL**, 2, 3.

Of counsel, see **TRIAL**, 5, 6.

MISREPRESENTATION:

By corporation in sale of shares, see **CORPORATIONS**, 3, 4.

Affecting validity of sale, see **SALES**, 1, 2.

MISTAKE:

Ejection of passenger through mistake of agent, see **CARRIERS**, 8.

As ground for rescission of contract, see **CONTRACTS**, 4.

MONEY:

Obtaining money under false pretenses, see **FALSE PRETENSES**.

MONEY PAID:

Interest recoverable for money paid by mistake, see **INTEREST**.

MONEY RECEIVED:

Recovery of money received for gambling purposes, see **GAMING**, 3.

MONTH:

Tenancy from month to month, see **LANDLORD AND TENANT**, 3.

MORTUARY TABLES:

Admissibility in action for damages for personal injuries, see **DAMAGES**, 9, 10.

MORTGAGES:

1. **MORTGAGES—FORECLOSURE—POSSESSION DURING REDEMPTION—COVENANTS.** Covenants of warranty in a mortgage do not prevent the mortgagors from claiming the right to occupy the homestead during the period of redemption, under Laws 1899, p. 94, § 15 providing therefor, which was in force when the mortgage was executed. *North Pacific Loan and Trust Co. v. Bennett*..... 34

2. **SAME—TIME FOR CLAIMING POSSESSION—HOMESTEAD—EXEMPTIONS.** Since Laws 1899, p. 94, § 15, providing that mortgagors are entitled to the possession of a homestead during the period of redemption from sale, is to be liberally construed as an exemption law, a homestead claim is in time if asserted after sale while the mortgagors are still in possession of the property. *North Pacific Loan and Trust Co. v. Bennett*..... 34

MORTGAGES—CONTINUED.

3. **SAME—AMOUNT—SEGREGATION.** Objection cannot be made that a homestead occupied by mortgagors during the period of redemption from sale exceeds in value the statutory homestead exemption, where no proceedings were sought to appraise or segregate the exempt portion or amount. *North Pacific Loan and Trust Co. v. Bennett* 34
4. **MORTGAGES—OPTION TO DECLARE DEBT DUE—RIGHTS OF ASSIGNEE.** An assignee of a mortgage giving to the mortgagor the option to declare the whole sum due upon default in the payment of interest or principal has the right to exercise the option, although the mortgage omits words of inheritance or of succession. *Bartlett Estate Co. v. Fairhaven Land Co.* 58
5. **SAME—PARTIAL RELEASE—CONSTRUCTION—MATURITY OF DEBT BY EXERCISE OF OPTIONS.** A release agreement providing that portions of the mortgaged premises shall be released upon the making of partial payments "prior to maturity," requires that such payments be made before the mortgagee has elected to declare the whole debt due for default in the payment of interest or installments of the principal; and evidence of sales, since the commencement of the action, of portions of the premises sufficient to pay the amount of the debt in arrears, is inadmissible. *Bartlett Estate Co. v. Fairhaven Land Co.* 58
6. **SAME—ATTORNEY'S FEES.** Upon the mortgagee's electing to declare the whole debt due after default in the payment of interest or installments, there should be allowed an attorney's fee based upon a recovery of the entire debt. *Bartlett Estate Co. v. Fairhaven Land Co.* 58

MOTIONS:

Judgment on motion as a bar, see JUDGMENT, 6.

MUNICIPAL CORPORATIONS:

Action on contractor's bond, notice of claim, see BONDS.

Repeal of ordinance prohibiting combination with competing gas company, see CORPORATIONS, 2.

Inadequate and excessive damages, see DAMAGES, 4.

Form of judgment in action to enjoin council from acts already performed, see INJUNCTION, 2.

Delegation to city of power to control sale of intoxicating liquors, see INTOXICATING LIQUORS.

Implied repeal of ordinance relating to law of road, see STATUTES, 7.

Water supply, rights of private consumers, see WATERS AND WATER COURSES.

1. **MUNICIPAL CORPORATIONS—ORDINANCE—EVIDENCE—JUDICIAL NOTICE.** A conviction in a city police court of the violation of a city ordinance, which was read to the jury by the court from a bound

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- volume of ordinances printed by authority of the city, cannot be objected to on appeal on the ground that the ordinance was not introduced in evidence, where no objection was taken below, since the existence of the ordinance was sufficiently established or would be judicially noticed. *Spokane v. Griffith* 293
2. **SAME—CONTRACTS—FAILURE OF OFFICER TO SIGN—EFFECT.** A charter provision requiring a contract to be signed by the comptroller is directory only, and a contract is not void for want of the comptroller's signature when his duty to sign was merely clerical. *Griffin v. Tacoma* 524
3. **MUNICIPAL CORPORATIONS—WATER SUPPLY—ACQUISITION—ORDINANCE—SUBMISSION TO VOTE—VALIDITY.** An ordinance for an election to authorize the purchase by a city of the plant of a water company need not specifically mention a source of supply held in reserve by the company, where the vote authorized the purchase of all sources of supply owned in connection with the system. *Griffin v. Tacoma* 524
4. **SAME—TWO IMPROVEMENTS INCLUDED—ASSESSMENT.** A single ordinance may provide for two improvements, one the widening of certain streets and the other a change of grade of certain streets, where both relate to a unified subject; and in such case each lot should bear its share of the resultant benefits from the improvement considered as an entirety. *In re Third, Fourth and Fifth Avenues* 109
5. **SAME—PROCEEDING—PETITION OF OWNERS—CONDITIONS—EFFECT—JURISDICTION.** A condition, expressed in a petition for a local improvement, calling for certain things and providing a lien therefor "so far as the same may be legally made a lien" is not a jurisdictional one, rendering the proceeding nugatory; since if it could not be legally done it was nevertheless the intention of the petitioners that the improvements be made. *James v. Seattle* 347
6. **SAME—CONTRACTS—VALIDITY—BIDS—CONDITIONS—EFFECT.** Conditions named in proposals for bids upon a contract for a municipal improvement, requiring the contractor to excavate for private property owners and to contract with them, do not render the proceeding void unless it can be said as a matter of law that the conditions necessarily increase the cost of the improvement. *James v. Seattle* 347
7. **SAME.** Where the regrade of streets calls for a cut of fifty feet, requiring abutting property to be sloped back, and, to be available, to be graded to street level, a condition requiring the contractor to contract with owners to excavate private property at the same price as bid for the street work does not necessarily increase the cost of the improvement to taxpayers, where it is not alleged to do so, as a matter of fact, and therefore does not render the contract void as a matter of law. *James v. Seattle* 347

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8. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SPECIAL WARRANTS—LIABILITY. A town is not liable out of its general fund upon warrants drawn against a special fund, issued to a contractor to pay for a local improvement, where the complaint does not state that the town has collected or diverted the money, but simply alleges that it has done nothing toward collection for the reason that the property was not specially benefited; since the warrant holder can compel the town to provide the fund, or if the property is not specially benefited, the contractor and holder are charged with notice thereof. *Soule v. Ocosta*..... 518
9. MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES—RIGHT TO OFFSET AGAINST ASSESSMENT—WAIVER—EMINENT DOMAIN. The right of a property owner to offset compensation for lands taken, in condemnation proceedings by a city for a local improvement, against an assessment for benefits to his other lands not taken, is not waived by taking warrants for such assessments which would presumably be payable in the order of their issuance, although the ordinance giving the right of a setoff provided that persons wishing to offset an award of compensation shall receipt therefor upon the execution docket and make satisfaction of the amount sought to be offset, etc.; since the failure to observe technicalities should not defeat the right of offset where no injury or expense resulted in taking out the warrants. *State ex rel. Guye v. Seattle*..... 41
10. SAME—PROPERTY LIABLE TO ASSESSMENT. The franchise and property of a street railway company in a street cannot be assessed for the improvement of the street by widening and regrading the same. *In re Third, Fourth and Fifth Avenues*..... 109
11. SAME—DETERMINATION OF ASSESSMENT. In condemnation proceedings for widening streets under a plan to regrade the same, the commissioners in determining the assessments for benefits to lands not taken may assume that, after the condemnation award, the city will regrade the street and complete the improvement within a reasonable time. *In re Third, Fourth and Fifth Avenues*..... 109
12. SAME—VALIDITY OF ASSESSMENT—CHANGE IN SCHEME VARIANCE WITHOUT PREJUDICE. A change in the scheme for widening a street whereby the condemnation of a twelve-foot strip occupied by a valuable building is abandoned, is not a variance fatal to the proceeding, where the omission of the strip did not increase the amount of the awards or the assessments and was not detrimental to any particular property in the district or to the improvement as a whole, and no prejudice to the property rights of the objectors was shown. *In re Third, Fourth and Fifth Avenues*..... 109
13. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT FOR BENEFITS—LIMITATION—PETITION BY OWNERS. Under Laws 1903, p. 121, restricting the city council, in levying assessments for local im-

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- provements, to fifty per cent of the assessed value of the property benefited, except where a petition by three-fourths of the owners specifies "not to exceed a certain higher percentage," the term "percentage" is not to be given a technical meaning restricting the assessment to a fractional part of the assessed value; but an assessment may be made for two hundred per cent of the value, when petitioned for, if within the constitutional limit of the value of actual benefits conferred. *James v. Seattle*..... 347
14. **SAME—PROCEEDINGS—MODE OF VALUATION—GENERAL ASSESSMENT AS BASIS.** Upon a petition for an improvement limiting the levy for benefits to two hundred per cent of the "assessed value," without specifying that reference was made to the last valuation for general taxation, it is proper to base the levy for benefits upon an assessment made after the petition was filed and before the ordinance was passed, if passed within a reasonable time. *James v. Seattle*.... 347
15. **SAME—PROCEEDINGS—MODE OF VALUATION—BASIS.** The previous assessment for general taxation controls the jurisdiction of the city to order an improvement, regardless of the fact that part of the property assessed is to be taken for widening the street; since such portion must be paid for when taken. *James v. Seattle*..... 347
16. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—VALIDITY—AGREEMENT EXEMPTING PROPERTY.** An assessment for a local improvement made under Bal. Code, § 775, which requires that each lot shall bear its proportion of the expense according to benefits received, and § 789, requiring the jury to offset benefits against damages, is invalidated by an agreement made between the city and certain property owners whereby an agreed verdict was to be returned allowing one dollar for land taken, one dollar for damages to land not taken, and one dollar for damages by reason of change of grade, where the agreement was carried out in the assessment of benefits by the jury, which was advised that there was no contest as to the lots of such owners. *In re Third, Fourth and Fifth Avenues*..... 109
17. **SAME—JURISDICTION—NECESSITY OF ORDINANCE—STATUTES—CONSTRUCTION IN OTHER STATES.** Where statutes relating to local improvements are practically a reproduction of the laws of another state, the decisions of such state holding that the court is without jurisdiction of an assessment proceeding unless it is based upon a valid ordinance will be followed by the supreme court of this state, and a valid ordinance is necessary to jurisdiction. *In re Third, Fourth and Fifth Avenues*..... 109
18. **SAME—EMINENT DOMAIN—COLLATERAL ATTACK.** Where property has been condemned for a local improvement, and supplementary proceedings are had for the assessment of the property benefited, objections to the confirmation of the assessment roll, on the ground

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- that verdicts were rendered in the condemnation proceedings under unlawful agreements with property owners whereby their property was relieved from assessment, constitute a collateral attack upon the condemnation proceedings, and cannot be entertained unless the judgments therein were rendered without jurisdiction. *In re Third, Fourth and Fifth Avenues*..... 109
19. **SAME—JURISDICTION—OBJECTIONS TO AWARD—COLLATERAL ATTACK.** Where an ordinance authorized a local improvement and the condemnation of property therefor, pursuant to the requirements of the law, and another ordinance authorized the city to enter into agreements with owners of certain property in effect exempting the same from assessment contrary to the requirements of the law, the two ordinances must be considered together as one, and confer no jurisdiction to enter judgments in the condemnation proceedings; hence the judgments of condemnation are void and may be collaterally attacked by objections to the confirmation of supplementary assessment proceedings. *In re Third, Fourth and Fifth Avenues*..... 109
20. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS—LIMITATIONS—ESTOPPEL—LACHES.** Under a statute authorizing a reassessment after the original assessment has been found invalid, which fixes no limitation as to the time within which the reassessment shall be made, a city is estopped to make a reassessment eleven years after the original assessment was declared void upon objection made by the city in actions brought against the city; since the delay was unreasonable. *Olympia v. Knox*..... 537
21. **MUNICIPAL CORPORATIONS—ASSESSMENTS—LIEN—WHEN ATTACHES—COVENANTS.** An assessment upon abutting property for a local improvement does not become a lien on the property, so as to constitute a breach of a covenant against incumbrances, until the assessment roll is placed in the hands of the officer authorized to collect the assessment, under the express provisions of Laws 1901, p. 240, § 1. *Knowles v. Temple*..... 595
22. **MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—ENFORCEMENT—LIMITATION OF ACTIONS.** Under Laws 1895, p. 270, the statute of limitations does not run against an action to enforce a lien for a special improvement assessment until ten years after the last installment of the assessment falls due. *Mathews v. Wagner*..... 54
23. **SAME—LIMITATION OF ACTIONS—STATUTES—REPEAL BY IMPLICATION.** Laws 1903, p. 26, amending the general statutes of limitations by adding the proviso exempting actions brought for the benefit of municipalities or the state, does not impliedly repeal the special act of 1895, p. 270, providing a limitation for the bringing of actions to enforce liens for local improvement assessments. *Mathews v. Wagner*
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24. **SAME—DELINQUENT ASSESSMENTS—RIGHTS OF HOLDER—SUBROGATION.** The holder of delinquency certificates issued by a city for overdue installments on local improvement assessments is subrogated to the rights of the city as to liens therefor upon the land, and may assert the liens against an action to quiet title. *Mathews v. Wagner*..... 54
25. **MUNICIPAL CORPORATIONS—DEFECTS IN STREET—EVIDENCE AS TO PLACE—QUESTION FOR JURY—IMPLIED DEDICATION.** In an action for personal injuries sustained by reason of defects in a street, the evidence is sufficient to warrant the submission to the jury of an issue as to whether the defect was in a public street, where it appeared that the town officers had exercised authority over the place by placing dirt and oil thereon for highway purposes, knowing that it was and would be used for such purposes, that the public had traveled over the place for twelve years, and that the town had constructed a cross-walk over the same; since dedication and acceptance may be implied from usage, the making of repairs, and invitation. *Spencer v. Arlington*..... 121
26. **MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—OBSTRUCTIONS—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to raise a question of fact for the jury as to the dangerous condition of a street, where it appears that the street and sidewalk were much obstructed by lumber from a mill on the abutting property and had been in that general condition for two years. *Larsen v. Sedro-Woolley*.. 134
27. **SAME—CONSTRUCTIVE NOTICE.** Obstruction of a sidewalk with lumber in a general way for two years is sufficient constructive notice to the city of the dangerous condition of the street. *Larsen v. Sedro-Woolley* .. 134
28. **SAME—CONTRIBUTORY NEGLIGENCE—WALKING ON PARKING STRIP.** The contributory negligence of one who trips over lumber, on the parking strip of a street, while going around a pile of lumber on the sidewalk, is a question for the jury, where the lumber prevented passage over the sidewalk; since the parking strip is part of the street and is to be kept reasonably safe. *Larsen v. Sedro-Woolley* 134
29. **MUNICIPAL CORPORATIONS—STREETS—NOTICE OF DEFECT—EVIDENCE—ADMISSIBILITY.** In an action for personal injuries sustained by reason of obstruction of a sidewalk that had continued for two years, it is admissible to show actual notice to the city by evidence of complaints made during such period. *Larsen v. Sedro-Woolley* 134
30. **MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—LAW OF ROAD VIOLATION—INSTRUCTIONS.** In an action against the driver of an automobile for coming up behind and running over a street sweeper while driving on the wrong side of the street in violation of a city ordinance, it is proper to refuse to instruct the jury that obstructions

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- on the other side of the street would warrant defendant in passing over to the wrong side, since defendant would be liable if he struck the plaintiff. *Suell v. Jones*..... 582
31. SAME. An extension of a city's water system to springs which it purchased with an existing system, and which it held for years as a reserve supply, is not a change in the plan of the city's water system which need be authorized by a vote of the people within the contemplation of Bal. Code, § 835. *Griffin v. Tacoma*..... 524
32. SAME—INDEBTEDNESS—CONSTITUTIONAL LIMIT. The transfer of general funds to a special fund for the purpose of constructing an extension to a water system is not the incurring of a municipal indebtedness, within the constitutional inhibition, where the special fund is solvent and the general fund is not imperilled. *Griffin v. Tacoma*
33. SAME—PLEDGING WATER RECEIPTS—SUBMISSION TO VOTE. The pledging of receipts from a water system for the purpose of paying for the cost of an extension does not create a municipal indebtedness; and the same need not be authorized by a vote of the people, where the funds are used to further a general plan pursuant to a vote once taken. *Griffin v. Tacoma*..... 524
34. SAME—POWER OF CITY—STATUTES—CONSTRUCTION. Laws 1901, p. 177, providing the details for the payment or securing of indebtedness for water works by the issuance of bonds or the pledging of water receipts, does not apply where no general indebtedness was created and the ordinance dealt only with increasing a water system by the expenditure of moneys received from the system itself. *Griffin v. Tacoma*..... 524
35. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—DIVERTING FUNDS. A city charter providing for special funds, and that all moneys collected by taxation for a special purpose shall remain in the special fund therefor, and that no fund shall be diverted from the purpose for which it was originally collected without a vote of the people, has reference only to a permanent diversion of funds, and does not prevent the temporary transfer as a loan of part of the general fund to a special fund having a permanent income under the control of the city. *Griffin v. Tacoma*..... 524
36. MUNICIPAL CORPORATIONS—COUNCIL—POWER TO COMPROMISE—CLAIM—INJUNCTION. A town council has no authority to compromise and satisfy a valuable judgment in favor of the town by accepting from the judgment debtors a small sum, and will be enjoined from so doing at the suit of a taxpayer. *Farnsworth v. Wilbur*

NAVIGABLE WATERS:

- Title to beds and shores of lake by adverse possession, see ADVERSE POSSESSION, 1, 3.
As boundaries, see BOUNDARIES, 2.

NAVIGABLE WATERS—CONTINUED.

1. SAME—LAKES—NAVIGABILITY. A lake with an area of nine hundred acres, five hundred of which is of a depth of twenty-five feet, used even to a limited extent by the public for navigation, and the shores of which were meandered by the government by lines which did not include the bed of the lake in any of the grants, is a navigable lake. *Brace & Hergert Mill Co. v. State*..... 326
2. NAVIGABLE WATERS—OBSTRUCTIONS—RIGHT TO INJUNCTION—RIPARIAN OR LITTORAL RIGHTS—"SHORE LANDS"—PREFERENCE RIGHTS. A littoral owner on the shore of a navigable lake cannot, by virtue of his riparian or littoral rights, maintain an action for an injunction against the maintenance of piling, boat houses, and permanent fixtures in front of his land, since the state is the owner of the bed of the lake; nor can such action be maintained by virtue of his preference right to purchase "shore lands," where the state has not established harbor lines, and the fixtures are maintained below the line of low water mark, it not appearing whether in water of sufficient depth for ordinary navigation. *Muir v. Johnson*..... 66
3. NAVIGABLE WATERS—TITLE TO BEDS—RIPARIAN OWNERS—SHORE LAND. The constitutional assertion by the state of ownership in the beds and shores of navigable lakes up to and including the line of ordinary high water vests the title thereto in the state, and the upland owners have no riparian rights therein by virtue of patents from the United States, except that patentees take title up to the meander line if the same was run below high water mark. *Brace & Hergert Mill Co. v. State*..... 326

NAVIGATION:

See NAVIGABLE WATERS, 1.

NECESSITY:

- Showing of necessity for receiver upon dissolution of corporation, see CORPORATIONS, 12.
- For condemnation by railroads, conclusiveness of findings on appeal, see EMINENT DOMAIN, 2.
- For condemnation of land for county road, collateral attack, see HIGHWAYS, 3.
- Of tender of deed to forfeiture of contract to convey land, see VENDOR AND PURCHASER, 4.

NE EXEAT:

1. NE EXEAT—GROUNDS—SHOWING—SUFFICIENCY—DIVORCE. A writ of *ne exeat* preventing an appellant in a divorce case from leaving the state pending the appeal will not be granted, in the absence of a sufficient showing that he is about to do so, and where he has given a supersedeas bond on appeal, and much of the property involved is real estate which cannot be conveyed without consent of the wife. *Holcomb v. Holcomb*..... 498

NEGLIGENCE:

- Of passenger, see CARRIERS, 5-7.
 In setting down passengers, see CARRIERS, 4-6.
 Of passenger in purchasing ticket, see CARRIERS, 9.
 In signing contract as estoppel to assert fraud in securing execution, see CONTRACTS, 1.
 Inadequate and excessive damages, see DAMAGES, 4-7.
 Of employers, see MASTER AND SERVANT.
 Contributory negligence of servant, see MASTER AND SERVANT, 8, 9, 11, 12, 15, 16.
 Risks assumed by servant, see MASTER AND SERVANT, 4, 5, 7, 9, 11, 12.
 Of person injured by defects in street, see MUNICIPAL CORPORATIONS, 28.
 Causing injuries to persons using streets, see MUNICIPAL CORPORATIONS, 25-30.
 Liability of surgeon for negligence, see PHYSICIANS AND SURGEONS, 1, 3, 4.
 In operation of trains, see RAILROADS, 2, 3.
 Of persons injured on or near railroad tracks, see RAILROADS, 3, 4.
1. NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR. The fact that a basket used in an overhead carrier system for conveying parcels in defendant's store fell upon and injured a customer in the store establishes a *prima facie* case of negligence, upon the principal of *res ipsa loquitur*, although the system was of standard make and in general use. *Anderson v. McCarthy Dry Goods Co.*..... 398

NEWLY DISCOVERED EVIDENCE:

See NEW TRIAL, 4.

NEW TRIAL:

- Effect of motion for new trial on time to appeal, see APPEAL AND ERROR, 11.
 Review of discretionary ruling on motion, see APPEAL AND ERROR, 17, 21, 22.
 Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 39, 40.
1. NEW TRIAL—GROUNDS—DISCRETION. It is discretionary to deny a new trial on the ground that the stenographer had lost his notes, the appellant offering to pay all costs in order to get a correct record. *Moylan v. Moylan*..... 341
2. NEW TRIAL—GROUNDS—MISCONDUCT OF COUNSEL. It is misconduct of the prevailing party requiring a new trial, for his counsel, in argument to the jury, to repeat a prejudicial comment on the evidence made by the judge when the jury was not present, counsel stating that the same was "said here by one who knows more about these things than I do," since the inference would carry to the jury that the judge had made such unlawful comment. *Spencer v. Arlington* 121

NEW TRIAL—CONTINUED.

3. NEW TRIAL—GROUNDS—TRIAL—MISCONDUCT OF COUNSEL. A new trial is properly granted for permitting, over objection, adverse comment to the jury by counsel on the fact that the plaintiff in a personal injury case had refused to consent to the examination of his physician as to facts learned in a professional capacity. *Kiehlhoefer v. Washington Water Power Co.*..... 646
4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly denied where no diligence was shown. *Goodrich v. Kimble*..... 516

NON OBSTANTE VEREDICTO:

See JUDGMENT, 3.

NONSUIT:

Before trial, see DISMISSAL AND NONSUIT.

NOTICE:

Of appeal, see APPEAL AND ERROR, 11, 12.
Of claim for materials furnished to contractor, see BONDS.
Application for release from custody of person acquitted on ground of insanity, see INSANE PERSONS.
To master of defects in appliances, see MASTER AND SERVANT, 1.
Defects or obstructions in street as affecting liability for negligence, see MUNICIPAL CORPORATIONS, 27, 29.
To purchaser of proceedings to vacate tax judgment, see TAXATION, 6, 7.

OBJECTIONS:

Review as dependent on objection made on trial, see APPEAL AND ERROR, 7.

OBSTRUCTIONS:

Of navigation, see NAVIGABLE WATERS, 2.

OFFICERS:

Corporate officers, see CORPORATIONS, 5-8.
Appointment of county officers, see COUNTIES.
Court commissioners, see COURT COMMISSIONERS.

OPINIONS:

As evidence of damages, see DAMAGES, 1.
In civil actions, see EVIDENCE, 7.

OPTION:

Performance of optional contract by contractor, see CONTRACTS, 5-7.
To declare mortgage debt due on default in paying interest or principal, see MORTGAGES, 4, 5.

ORAL CONTRACTS:

See **FRAUDS, STATUTE OF**, 2.

ORAL EVIDENCE:

See **EVIDENCE**, 6.

ORAL NOTICE:

Of appeal, see **APPEAL AND ERROR**, 11.

ORDERS:

Of reference to court commissioner, see **REFERENCE**.

ORDINANCES:

Repeal of ordinance prohibiting combination with competing gas company, see **CORPORATIONS**, 2.

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 1, 3, 4, 17, 19.

Implied repeal of city ordinances relating to law of road, see **STATUTES**, 7.

ORIGINAL JURISDICTION:

Of courts, see **COURTS**, 2, 3.

OWNERSHIP:

Name of owner in summons in county foreclosure proceedings, see **TAXATION**, 4, 5.

PARKS:

Sufficiency of oral dedication to public use, see **DEDICATION**.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 2.

PAROL EVIDENCE:

See **EVIDENCE**, 6.

To vary terms of written contract, see **SALES**, 2.

PARTIES:

Persons entitled to appeal, see **APPEAL AND ERROR**, 3-5.

In bonds on appeal, see **APPEAL AND ERROR**, 10.

Entitled to alleged error, see **APPEAL AND ERROR**, 18.

Substitution of party as constituting prejudicial error, see **APPEAL AND ERROR**, 38.

To proceedings appointing receiver upon dissolution of corporation, see **CORPORATIONS**, 11.

Admissions as evidence, see **EVIDENCE**, 4.

In action for trespass, see **TRESPASS**, 2, 3.

PARTNERSHIP:

- Parol evidence to show intent to form partnership, see EVIDENCE, 6.
Amendment of pleadings to ask accounting, see PLEADING, 5.
Right of corporation to quiet title to property omitted in transfer of
partnership property to corporation, see QUIETING TITLE, 1.
1. PARTNERSHIP—CONTRACT—CREATION OF RELATION—EVIDENCE—SUF-
FICIENCY—ACCOUNTING. An agreement for a partnership, in effect,
or at least a joint venture of a fiduciary character, with the right to
an accounting for profits, is shown where, in addition to positive
testimony that a partnership was intended, the contract provided
that the plaintiff was to endorse notes for \$6,000 to enable the de-
fendant and another, who originally were the sole partners in the
venture, to take a stock of goods, valued at \$20,000, into Alaska and
establish a trading post and store; that, in consideration thereof,
he was to have a one-third interest in all mining claims and prop-
erty acquired, and one-third of the proceeds of the stock, the notes
to be paid from the profits if sufficient was realized; and that, if the
business continued more than one season, each of the three was to
furnish, besides his services, one-third of the funds necessary for the
next season; and where it further appeared that the defendant and
his partner in the venture had sustained a loss at sea, and being
unable to proceed, had disposed of the goods at a heavy loss, and
they sought assistance from the plaintiff, who personally signed the
notes mentioned in the contract and procured their endorsement by a
responsible party, his father-in-law, whereby the stock of goods was
repurchased and transportation procured to a remote and unknown
region where the trading post was established as contemplated by
the two partners in the first instance. *Causten v. Barnette*..... 659
2. PARTNERSHIP—CONTRACTS—VALIDITY — AUTHORITY TO CONTRACT—
FILING CERTIFICATE—STATUTES—VIOLATION—EFFECT. The contracts
of a partnership are not invalidated by reason of its failure to file
with the county clerk a certificate showing the names of the
partners, as required by Laws 1907, p. 288; since the statute does
not so provide and contains nothing from which such effect can be
inferred, under the strict construction requiring a law in derogation
of a common law right to clearly show the intent. *Sutton & Co. v.
Coast Trading Co.*..... 694
3. PARTNERSHIP—ACTIONS BETWEEN PARTNERS—DISSOLUTION AGRE-
EMENT—EVIDENCE—SUFFICIENCY. In an action between former equal
partners, plaintiff claiming that upon dissolution the defendant had
overdrawn in a certain sum, and had agreed to pay plaintiff any
sum overdrawn, findings that no such promise was made are sus-
tained where the evidence was conflicting, in view of the improba-
bility of such promise. *Maitland v. Purdy*..... 575
4. SAME—RIGHTS AND DUTIES. Upon the dissolution of an equal
partnership, an express promise is not necessary for the recovery of
one-half of the sum overdrawn by one of the partners. *Maitland v.
Purdy* 575

PARTNERSHIP—CONTINUED.

5. SAME—INEQUITABLE CONTRACT—RIGHT TO ACCOUNTING. Such a contract is not so inequitable or unjust that an accounting will not be ordered, in view of the fact that the goods were sent to a wild and unknown region, before the discovery of gold there, where the risk of loss of the goods was great and the prospects of profits uncertain. *Causten v. Barnette* 659
6. SAME—LACHES. In such a case the plaintiff is not guilty of laches in not demanding an accounting from 1901 until 1906, where it appears that, when the notes became due, the defendant requested the consent of the endorser, plaintiff's father-in-law, to an extension of time, urging that it would be to the plaintiff's interest; that defendant, upon desiring to extend operations, had approached plaintiff for further advances and promised to make a statement of the condition of the business up to that time; and that he made no denial of the partnership and his obligation to account when interviewed by plaintiff's attorneys on the subject. *Causten v. Barnette* 659
7. SAME—ACCOUNTING BETWEEN PARTNERS—INJUNCTION—PARTIES INJURED. Where a partner is liable to an accounting, an injunction restraining him from disposing of alleged partnership property is properly extended to enjoin certain codefendants alleged to be his friends and relatives, in whom the defendant had placed the property in furtherance of his attempt to defraud the plaintiff. *Causten v. Barnette* 659
8. SAME—ACTIONS—RIGHT TO MAINTAIN. Laws 1907, p. 290, § 5, providing that no action shall be maintained by a copartnership without alleging and proving the filing of a certificate with the county clerk as required by § 1 to entitle it to do business, is complied with by filing the certificate before suit brought upon a contract; since the contract is not void for failure to make a previous filing. *Sutton & Co. v. Coast Trading Co.* 694

PART PERFORMANCE:

To satisfy statute of frauds, see **FRAUDS, STATUTE, 2.**

PASSENGERS:

Who are, see **CARRIERS, 3.**

PAYMENT:

Of license fee as condition to maintenance of action, see **CORPORATIONS, 1.**

Under agreement for partial release, see **MORTGAGES, 5.**

PERFORMANCE:

Of building contract, see **CONTRACTS, 5-7.**

Right to cease work under contract upon refusal of make payments, see **LOGS AND LOGGING, 5.**

PERFORMANCE—CONTINUED.

- Of contract by surety company after default of contractor, see **MECHANICS' LIENS**, 3, 4.
Of contract by vendee, see **VENDOR AND PURCHASER**, 6, 7, 9.

PERSONAL INJURIES:

- See **NEGLIGENCE**.
To passenger, see **CARRIERS**, 3-7.
Damages for, see **DAMAGES**.
To employee, see **MASTER AND SERVANT**.
Injuries caused by defects or obstructions in streets or other public places, see **MUNICIPAL CORPORATIONS**, 25-30.
Injuries resulting from malpractice of physician, see **PHYSICIANS AND SURGEONS**.
To trespasser or licensee, see **RAILROADS**, 2.
To person on or near railroad tracks, see **RAILROADS**, 3, 4.

PETITION:

- By owners for local improvement, see **MUNICIPAL CORPORATIONS**, 5, 13.

PHYSICIANS AND SURGEONS:

1. **PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.** Upon conflicting evidence in an action for malpractice in treating a foot by exposure to X-rays, the question of the negligence of the defendant is for the jury, where there was evidence warranting a finding that the foot was severely burned by the X-rays, and the treatment improper, and that the injury was caused by negligence in placing the tubes too near and without any shield. *Sauers v. Smits* 557
2. **SAME—LIABILITY—DEFENSES—IGNORANCE OF PHYSICIAN.** Ignorance as to the effect of X-ray exposures would be no defense to an action for malpractice in negligently causing an X-ray burn, but rather might make the use thereof negligence *per se*. *Sauers v. Smits* 557
3. **SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE OF PATIENT.** In an action for malpractice in negligently causing an X-ray burn of a foot, it is error to instruct the jury that the plaintiff could not recover if she quit the treatment before she should have done so, or if she failed to follow the physician's directions with reasonable care; since such acts adding to the damages did not co-operate in causing the injury or bar a recovery for the injury done. *Sauers v. Smits* 557
4. **SAME.** In such a case, it is error to instruct that any injury resulting from the negligence of the patient would bar a recovery. *Sauers v. Smits* 557

PLACE:

- Residence of parties to action as affecting venue, see **VENUE**.

PLATS:

Description of boundaries, see BOUNDARIES, 1.

PLEA:

In civil actions, see PLEADING.

PLEADING:

Joinder of causes of action, see ACTION.

Defense in action for destruction of infected fruit, see AGRICULTURE.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 31, 38.

Presumptions on appeal, as to pleadings, see APPEAL AND ERROR, 20.

Presumption as to amendment, see APPEAL AND ERROR, 19.

Payment of license fee in order to maintain action, see CORPORATIONS, 1.

In action on indemnity bond, see INDEMNITY, 1.

Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.

Amendment to conform to proof, see INJUNCTION, 2.

Actions for libel or slander, see LIBEL AND SLANDER, 4-8.

Counterclaim for damages in action for wrongful issuance of attachment, see SET-OFF AND COUNTERCLAIM.

Necessity for pleading foreign statutes, see STATUTES, 11.

Applicability of instructions to pleadings, see TRIAL, 12.

Necessity of written pleadings, see TRIAL, 1.

1. PLEADING—CAUSES — SOURCES OF TITLE — SEPARATE STATEMENT — ELECTION. In an action to establish water rights, based upon the plaintiffs' claims under (1) riparian ownership, (2) appropriation, and (3) contract, a motion to separately state the several causes of action and to elect upon which they will rely is properly overruled; since there was but one indivisible cause of action, and the independent sources of plaintiff's title do not constitute separate causes. *Hutchinson v. Mt. Vernon Water and Power Co.*..... 469
2. PLEADING—ANSWER — INCONSISTENT DEFENSES. A denial of the execution of a contract, and an affirmative defense setting up that any signature of the defendant secured by plaintiff to any contract was obtained by trickery and fraud, which was set forth, are not inconsistent defenses. *Loveland v. Jenkins-Boys Co.*..... 369
3. PLEADING—ANSWER—ARGUMENTATIVE DENIAL. In an action of unlawful detainer, an answer that defendants were holding under a different lease from that alleged in the complaint is only an argumentative denial, and adds nothing to a general denial in the answer. *Ryan v. Lambert*..... 649
4. SAME—REPLY—INCONSISTENCY. A denial in a reply that defendants hold under a certain lease is not inconsistent with a denial of the validity of the lease. *Ryan v. Lambert*..... 649

PLEADING—CONTINUED.

5. PLEADINGS—AMENDMENTS—ABUSE OF DISCRETION—PARTNERS—ACCOUNTING. In an action between former partners, upon an alleged promise to pay whatever amount was overdrawn on dissolution of the partnership, it is an abuse of discretion to refuse leave to amend the complaint so as to ask an accounting, where it appears at the trial that no such promise was made as alleged, but that the parties had been equal partners and that defendant had overdrawn a sum that could be determined only upon an accounting; since a party is not to be turned out of court if entitled to any relief. *Maitland v. Purdy* 575
6. PLEADING—SUPPLEMENTAL ANSWER—SETTLEMENT PENDING SUIT. It is proper to allow a supplemental answer to show a settlement made after the verification and service of the original answer. *McRea v. Warehime* 194
7. PLEADING—ISSUES, PROOF AND VARIANCE. A defendant cannot complain that evidence and instructions were not applicable to the issues presented by the complaint, when such issues were brought in by his affirmative answer. *Ryan v. Lambert* 649

PLEDGES:

Pledge of water receipts as constituting indebtedness, submission to vote, see MUNICIPAL CORPORATIONS, 33, 34.

1. PLEDGES—WRONGFUL ENFORCEMENT—SALE IN BAD FAITH. Where the payee of a note of a corporation, holding collateral under a power to sell at private sale without notice, refused to consider an offer of \$5,000 for the collateral, made by stockholders of the corporation, and subsequently sold the collateral privately for \$2,500, the payee is guilty of bad faith and is liable to the corporation for the actual value of the collateral, since it was bound to realize as near the value as possible. *German-American State Bank v. Spokane-Columbia River R. & Nav. Co.* 359
2. PLEDGES—WRONGFUL ENFORCEMENT—EVIDENCE OF VALUE. Where the holder of collateral refused an offer of \$5,000 therefor, and then sold the same privately for \$2,500, and there was no other evidence of the value of the collateral, the same should be found to be \$5,000. *German-American State Bank v. Spokane-Columbia River R. & Nav. Co.* 359

POLICE POWER:

Closing of theaters on Sunday as exercise of police power, see CONSTITUTIONAL LAW, 3.

POSSESSION:

See ADVERSE POSSESSION.

By mortgagors during period of redemption, see MORTGAGES, 1-3.

POWERS:

Of court commissioners, see **COURT COMMISSIONERS**, 2.

PRACTICE:

See **APPEAL AND ERROR**; **CERTIORARI**; **CONTINUANCE**; **COSTS**; **CRIMINAL LAW**; **DAMAGES**; **DEPOSITIONS**; **DISMISSAL AND NONSUIT**; **DIVORCE**; **JUDGMENT**; **NEW TRIAL**; **PLEADING**; **PROCESS**; **REFERENCE**; **TRIAL**.

PRECEDENTS:

Judicial decisions and *stare decisis*, see **COURTS**, 1.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 30-38.

PRESCRIPTION:

Establishment of highways, see **HIGHWAYS**, 1.

PRESUMPTIONS:

On appeal, see **APPEAL AND ERROR**, 20.

As to existence of reason for taking deposition, see **DEPOSITIONS**.

As to order of reference, see **REFERENCE**.

PRIMARY ELECTIONS:

Dismissal of appeal from judgment dismissing action to enjoin holding of, see **APPEAL AND ERROR**, 6.

PRINCIPAL AND AGENT:

See **BROKERS**.

Signing of notice of claim for materials furnished contractor, see **BONDS**, 2.

Liability of carrier for acts of employees in ejecting passengers, see **CARRIERS**, 8.

Contractor as agent of owner entitled to lien, see **LOSS AND LOGGING**, 1.

Specific performance of contract made by agent to convey land, see **SPECIFIC PERFORMANCE**, 1.

Sale of land by broker, authority and ratification, see **VENDOR AND PURCHASER**, 1-3.

Authority of agent, see **VENDOR AND PURCHASER**, 9.

1. **PRINCIPAL AND AGENT—AUTHORITY OF AGENT—RATIFICATION OF AGENT'S ACT.** Where the incorporators of a trust company abandon the enterprise because of inability to secure subscriptions to the stock, a paid up subscriber to the stock does not, as a matter of law, ratify the unauthorized investment of his money in a state bank by reason of failing to promptly object, but the same is a question for the jury, where it appears that the subscriber was a farmer, unacquainted with business methods, that the secretary of the trust company, in the letter inclosing stock of the state bank, falsely

PRINCIPAL AND AGENT—CONTINUED.

- represented that such investment was only temporary and for the purpose of paying a dividend until incorporation of the trust company, subscriptions to which would be solicited until they could complete organization and take over the business of the bank; since full knowledge of material facts is essential to ratification. *Miller v. Denman* 217
2. SAME. In such a case, the subscriber would not be compromised by his election, against his protest, to the office of director and vice president of the trust company. *Miller v. Denman* 217
3. SAME—EVIDENCE OF RATIFICATION. Upon an issue as to the ratification of an unauthorized investment of plaintiff's money in bank stock, which plaintiff had not promptly returned on receipt, plaintiff may show that the certificate delivered was an overissue, and also that a portion of his money represented to be invested in the stock had been used to start a small bank in another town, he having no knowledge of such facts at the time. *Miller v. Denman* 217

PRINCIPAL AND SURETY:

See INDEMNITY.

Indemnity against claims, and completion of contract on default of contractor, see MECHANICS' LIENS.

PRIVILEGED COMMUNICATIONS:

Defamatory communications, see LIBEL AND SLANDER, 3.

PROCESS:

On appeal, see APPEAL AND ERROR, 11, 12.

Want of process as grounds for collateral attack on judgment, see JUDGMENT, 7.

In foreclosure of delinquency tax certificate, see TAXATION, 2, 4, 5, 6.

1. PROCESS—SUMMONS BY PUBLICATION—FORM—SUBSTANTIAL COMPLIANCE. A summons for publication requiring the defendant to appear within sixty days after a specified date, is "substantially" in the form prescribed by Bal. Code, § 4878, which requires appearance to be within "sixty days after the date of the first publication of this summons, to wit, within sixty days after....day of.....;" the omission of reference to the first publication being immaterial where the date thereof itself is given. *Stubbs v. Continental Timber Co.* 431

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

Adverse possession, see ADVERSE POSSESSION.

Dedication to public use, see DEDICATION.

Taking for public use, see EMINENT DOMAIN.

Separate or community character, see HUSBAND AND WIFE.

PROPERTY—CONTINUED.

Nature of property liable to assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 10.

Acquiring adverse title to vendor at tax sale by purchaser in possession under contract for conveyance, see **VENDOR AND PURCHASER**, 8.

PUBLICATION:

Of summons, substantial compliance with statute, see **PROCESS**.

Of summons in tax foreclosure proceedings, see **TAXATION**, 2, 4, 5, 6.

PUBLIC IMPROVEMENTS:

By cities, see **MUNICIPAL CORPORATIONS**.

PUBLIC LANDS:

Acquisition by adverse possession, see **ADVERSE POSSESSION**.

Injunction to protect rights in, see **INJUNCTION**, 1.

Conflict in location of rights of way over land purchased from state, see **RAILROADS**, 1.

Parties defendant in action by lessee for trespass on tide lands, see **TRESPASS**, 2.

1. PUBLIC LANDS—GRANTS—RAILROAD RIGHT OF WAY—CONDITIONS SUBSEQUENT—FORFEITURE—WHO MAY CLAIM. Act of Cong. of June 4, 1898, granting a railroad right of way through the Colville Indian Reservation becomes a grant *in praesenti* upon the filing and approval of the map of definite location; and the provision in section 5 of the act that the grant shall be forfeited unless grading shall be commenced within six months, and twenty-five miles of railroad be completed within two years, is a condition subsequent which can only be taken advantage of by the government by a judicial proceeding or appropriate legislative action in the nature of "office found." *Spokane and British Columbia R. Co. v. Washington & Great Northern R. Co.*..... 280
2. PUBLIC LANDS—TIDE LANDS—TITLE TO CLAMS. Clams imbedded in tide lands leased by the state belong to the lessee of the land. *Sequim Bay Canning Co. v. Bugge*..... 127
3. SAME—POWER TO SELL TIDE LANDS. The state has power to dispose of and invest private persons with the ownership of tide lands, subject only to the paramount right of navigation and the uses of commerce. *Sequim Bay Canning Co. v. Bugge*..... 127
4. SAME—RIGHTS OF LESSEE—TRESPASS. The lessee of tide lands under a regular lease from the state is entitled to the possession and control of the land thereof, and a third person digging clams thereon at low tide is a trespasser. *Sequim Bay Canning Co. v. Bugge*.. 127

PUBLIC USE:

Dedication of property, see **DEDICATION**.

PUBLIC WATER SUPPLY:

See WATERS AND WATER COURSES.

QUALIFICATIONS:

Of superior judge, residence in county, see JUDGES.

QUESTION FOR JURY:

Negligence of passenger in purchasing ticket for transportation, see CARRIERS, 9.

In actions for personal injuries, see MASTER AND SERVANT, 6, 11-13.

Defect in public street causing injury, see MUNICIPAL CORPORATIONS, 25.

Negligence of physician in treatment of patient, see PHYSICIANS AND SURGEONS, 1.

Liability for injuries to licensee or trespasser on train, see RAILROADS, 2.

Negligence of person in crossing railroad track, see RAILROADS, 4.

In civil actions in general, see TRIAL, 7.

QUIETING TITLE:

See BOUNDARIES, 1.

Amount of stay bond on appeal, see APPEAL AND ERROR, 13.

1. QUIETING TITLE—EVIDENCE—SUFFICIENCY—DEFENSES—STIPULATED DAMAGES—PARTNERSHIP—DISSOLUTION—EFFECT OF STIPULATION. Where copartners dissolved partnership and formed a corporation, agreeing to convey all their real estate to it in consideration of stock, but in the conveyance a certain tract was omitted because of pending negotiations for its sale or trade to a third party, which however was never consummated, the corporation is entitled to have its title quieted as against such third person and a retiring partner who had made a quitclaim deed thereof to such third party with full knowledge of the facts; and the fact that the copartners, upon dissolving partnership and transferring the interest of one to the other, had agreed upon stipulated damages for breach of the terms of their dissolution agreement, would have no effect upon the corporation's right to relief. *Thompson-Spencer Co. v. Thompson.* 170
2. QUIETING TITLE—DECREE. In an action to quiet title, the plaintiffs are not entitled to any decree where they fail to show any actual conflict between their claims and those of the defendants. *Mason v. Long*..... 18

RAILROADS:

Contributory negligence of passengers, see CARRIERS, 7.

Injuries to passengers on street car, see CARRIERS, 4-6.

Carriage of goods and passengers, see CARRIERS.

Ejection of passengers and intruders, see CARRIERS, 8-10.

Discrimination of freight rates in violation of interstate commerce law, see COMMERCE.

RAILROADS—CONTINUED.

Exercise of power of eminent domain, see **EMINENT DOMAIN**.

Sale of county road to railway company, see **HIGHWAYS**, 4.

Liability of property to assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 10.

Grants of land in aid, see **PUBLIC LANDS**, 1.

1. **RAILROADS—LOCATION OF LINE—PUBLIC LANDS—CONVEYANCE FROM STATE—DESCRIPTION — INJUNCTION — TRESPASS TO REAL PROPERTY—EVIDENCE—SUFFICIENCY.** Upon an issue, in an action to restrain a trespass, as to a conflict between the survey and location of rights of way of rival railroad companies, over lands applied for and purchased from the state, the plaintiff company fails to establish any legal or equitable rights to the defendant's location, where it appears that the plaintiff's line was actually located on the ground in dispute in 1899, but was erroneously described in its application and field notes, and the plaintiff purchased land from the state with reference to such erroneous description, which lay to the north of the actual survey and of defendant's location, that the plaintiff did not proceed with the construction of its road for seven years, or intend to do so in the near future, and that defendant in 1905 made its location and purchased its right of way, denying actual knowledge of the plaintiff's mistake, the stakes of plaintiff's survey being destroyed or only distinguishable with difficulty; although the contour of the ground admitted of only one practicable route. *Columbia Valley R. Co. v. Portland & Seattle R. Co.*..... 88
2. **RAILROAD—OPERATION—INJURY TO TRESPASSER ON TRAIN — CARE AS TO LICENSEE—NOTICE—QUESTION FOR JURY.** There is no liability for injuries sustained while riding on a switching train without the knowledge of the company or its employees, and a verdict should be directed for the defendants, where it appears from plaintiff's evidence that, after riding a short distance by permission of, and with, the rear brakeman on a flat car, the plaintiff left the train at a point where it had stopped, and walked forward and climbed on a load of lumber near the middle of the train with boys who were hiding from the train crew, and fell upon attempting to pass over the tops of the cars, none of the train crew having any knowledge that the boys were on the train; since even if plaintiff was a licensee, the company's duty to exercise reasonable care was not violated. *Johnson v. Great Northern R. Co.*..... 98
3. **RAILROADS—NEGLIGENCE—DEATH OF PEDESTRIAN ON TRACK—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.** In an action for the death of a person struck by an engine, based upon negligence of the railroad company before the deceased was struck, and also in starting up the engine again while deceased was still alive and in a position of peril, it was error to refuse to charge that the deceased's contributory negligence in going on the track without stopping to look or

RAILROADS—CONTINUED.

- listen would bar a recovery, unless the company failed to exercise reasonable care after learning that the deceased was in a position of danger. *Gregg v. Northern Pac. R. Co.*..... 183
4. **SAME—LOOKING AND LISTENING—QUESTION FOR JURY.** A man fifty-one years of age possessed of all his faculties, is guilty of contributory negligence, as a matter of law, in crossing a railroad track at a station to board an incoming train, where it appears that he knew the train was coming in and stepped from behind the corner of a house eight feet from the tracks, in front of the approaching engine, which was only fifteen feet distant, attempting to cross to the station platform without stopping to look or listen for the train. *Gregg v. Northern Pac. R. Co.*..... 183

RATIFICATION:

- Of appointment of deputy engineer, see COUNTIES, 2.
- Of act of agent, see PRINCIPAL AND AGENT, 1, 3.
- Of agent's contract to convey land, see SPECIFIC PERFORMANCE, 1, 2.
- Of sale of land by broker, see VENDOR AND PURCHASER, 3.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

- Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF.

REASONABLE DOUBT:

Instructions as to reasonable doubt, see CRIMINAL LAW, 4.

REASSESSMENT:

- Of property for benefits from public improvements, see MUNICIPAL CORPORATIONS, 20.

RECEIVERS:

On dissolution of corporation, see CORPORATIONS, 11, 12.

RECORDS:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 17.

REDEMPTION:

Possession of premises during period of, see MORTGAGES, 1-3.

REFERENCE:

1. **REFERENCE—ORDER—COURT COMMISSIONERS—EXECUTION—SUPPLEMENTAL PROCEEDINGS—APPEAL—REVIEW—PRESUMPTIONS.** An order in supplemental proceedings "to appear before S., court commissioner" for examination, will be considered as an order of reference to a court commissioner, especially where the court of original

REFERENCE—CONTINUED.

Jurisdiction construed the same to have that effect; since the journal entry is only evidence of the court's action, and on appeal will be given the same interpretation as given by the lower court. *Howard v. Hanson*..... 314

RELEASE:

Partial release upon payments prior to maturity, construction of agreement, see MORTGAGES, 5.

RELEVANCY:

Of evidence in criminal prosecutions, see CRIMINAL LAW, 1, 2.

RENDITION:

Time of rendering judgment, see JUDGMENT, 1.

REOPENING CASE:

For further evidence, see TRIAL, 4.

REPEAL:

Implied repeal of ordinance prohibiting combination with competing gas company, see CORPORATIONS, 2.

Of statute providing limitation of action to enforce local assessment lien, see MUNICIPAL CORPORATIONS, 23.

Implied repeal of act to regulate or prohibit sale of liquors, see STATUTES, 9.

Implied repeal of ordinance relating to law of road, see STATUTES, 7.

Re-enactment of prior laws, effect of insufficient title to act, see STATUTES, 6.

REPLY:

See PLEADING, 4.

REPRESENTATION:

Representation of corporations by officers or agents, see CORPORATIONS, 5, 7.

REPUTATION:

Of accused as evidence, see CRIMINAL LAW, 1, 2.

REQUESTS:

For instructions in civil actions, see TRIAL, 9, 10, 14.

RESCISSON:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contract, see CONTRACTS, 4.

For fraud in sale of corporate stock, see CORPORATIONS, 3, 4.

Of contract for sale of goods, see SALES, 1.

Of contract for sale of land, see VENDOR AND PURCHASEE, 4.

RESIDENCE:

Of county judge as affecting jurisdiction of court, see JUDGES.
Of parties to action as affecting venue, see VENUE.

RES JUDICATA:

See JUDGMENT, 6, 8.
Decision on appeal as law of the case on new trial in lower court, see APPEAL AND ERROR, 39, 40.

RESULTING DAMAGES:

In action for personal injuries, see DAMAGES, 3.

RETROACTIVE LAWS:

See STATUTES, 5.

REVIEW:

By higher court by appeal for errors or irregularities, see APPEAL AND ERROR.
Statutory writ of review, see CERTIORARI.
In criminal prosecutions, see CRIMINAL LAW, 5.
Of proceedings to establish highways, see HIGHWAYS, 3.
Of action refusing liquor license, see INTOXICATING LIQUORS, 2.

REVOCATION:

Of liquor license, see INTOXICATING LIQUORS, 3-5.

RIGHT OF WAY:

Of railroads, see RAILROADS, 1.

RIPARIAN RIGHTS:

See NAVIGABLE WATERS.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 4, 5, 7, 9, 11, 12.

ROADS:

See HIGHWAYS.

Defects in streets in cities, see MUNICIPAL CORPORATIONS, 25-29.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 3, 7, 9, 14.

SALARY:

Liability of corporation to officer failing to perform services, see CORPORATIONS, 8.

SALES:

Of real property by brokers, see BROKERS.
Of corporate stock, see CORPORATIONS, 3, 4.
Of intoxicating liquors, see INTOXICATING LIQUORS.
Liability of payee of note for wrongful sale of collateral, see PLEDGES.
Of tide lands, see PUBLIC LANDS, 3.
Tax sales, see TAXATION.
Of real property, see VENDOR AND PURCHASER.

SALES—CONTINUED.

1. **SALES—RESCISSON BY VENDEE—MISREPRESENTATIONS.** An action for rescission of a sale of personal property constituting a restaurant outfit may be based upon misrepresentations by the vendor as to the amount of indebtedness outstanding against the property, within the knowledge of the vendor and unknown to the vendee, and which induced the vendee to make the purchase. *Pitman v. Erskine*.. 166
2. **SAME—EVIDENCE—PAROL—TO VARY WRITTEN CONTRACT.** In an action for the rescission of a written contract for the sale of personal property, on the ground of misrepresentations of the vendor as to the amount of indebtedness outstanding against the property, it is not error to exclude evidence to show that the vendee was requested, and declined, to investigate as to the amounts due, where the effect of the evidence would have been to vary the terms of the written contract. *Pitman v. Erskine*..... 166
3. **SALES — CONTRACTS — SPECIAL WARRANTY — CONSTRUCTION — REMEDIES OF VENDEE.** Upon the sale and return of a road locomotive under a special warranty providing that if the engine is returned after a ninety-day test, the vendee shall pay the vendor \$1.20 per thousand for all lumber hauled during the test, "less the actual engine expense paid and less the freight money paid by the purchasers," the accounts are balanced where such expense exceeds the toll for hauling lumber; and a judgment in favor of the vendee for the excess of expense and freight paid is unwarranted. *Spirit Valley Lumber Co. v. Averill Machinery Co.*..... 46
4. **SAME—REMEDIES OF VENDOR.** Upon the return of an engine for failure to comply with a special warranty providing for a test, the vendor is not entitled to recover for goods and wares placed upon the engine and returned with it at the end of the test. *Spirit Valley Lumber Co. v. Averill Machinery Co.*..... 46
5. **SALES—AVOIDING CONTRACT—RETURN OF Goods—LIEN FOR ADVANCES.** A consignee who receives and advances the freight on a shipment of goods, which he was not under contract to take, as appears after opening the package, is not under obligation to return them, but may give notice and hold them until repayment of the advance. *Loveland v. Jenkins-Boys Co.*..... 369
6. **SAME.** The purchaser of a road engine is not entitled to recover damages for breach of an implied warranty, where the machine was sold under written general and special warranties, which provided for a ninety-day test and the return of the machine within that time, if not satisfactory, with cancellation of notes for the purchase price and no further claim to be made upon the vendor; the special warranty further providing for certain payments for use of the engine, less sums paid out for engine expense and freight. *Spirit Valley Lumber Co. v. Averill Machinery Co.*..... 46

SEPARATE PROPERTY:

Of husband or wife, see **HUSBAND AND WIFE**.

SERVANTS:

See **MASTER AND SERVANT**.

SET-OFF AND COUNTERCLAIM:

As ground for objecting to discontinuance, see **DISMISSAL AND NON-SUIT**.

For injuries to abutting property by street improvements, see **MUNICIPAL CORPORATIONS**, 9, 16.

1. **SET-OFF AND COUNTERCLAIM—ATTACHMENT—WRONGFUL ATTACHMENT—PLEADING.** A counterclaim for damages arising out of the wrongful issuance of attachment cannot be pleaded in answer to the complaint in the original action. *Veysey v. Thompson*..... 571

SETTLEMENT:

See **COMPROMISE AND SETTLEMENT**.

SHORES:

Ascertainment of boundary line of navigable lake, see **BOUNDARIES**, 2.

Of navigable waters, see **NAVIGABLE WATERS**.

SIGNATURES:

To bills or notes, see **BILLS AND NOTES**.

To notice of claim in action on contractor's bond, see **BONDS**, 2.

Effect of officer's failure to sign contract, see **MUNICIPAL CORPORATIONS**, 2.

SILENCE:

As estoppel, see **ESTOPPEL**.

SLANDER:

See **LIBEL AND SLANDER**.

SPECIFIC PERFORMANCE:

Of escrow agreement, see **ESCROWS**.

Requisites, validity and construction of contracts for sale of land, see **VENDOR AND PURCHASER**, 1, 2, 5.

1. **SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY—PRINCIPAL AND AGENT—AUTHORITY OF AGENT—RATIFICATION.** Specific performance of a contract to convey land cannot be decreed where it appears that the same was made by agents of a nonresident owner who at the time had no authority to sell or offer the same for sale; that the terms of the contract, which was subject to the owner's approval, gave the vendees thirty days within which to close the deal after the title was made good, but this and other terms were never disclosed to the owner or approved by him; that the owner by telegraph finally authorized a sale at the price fixed, providing "\$15,000 be paid

SPECIFIC PERFORMANCE—CONTINUED.

- down," and executed deeds and approved securities to close the sale; that after some delay the agents of the owners notified the vendees that the sale must be closed within a certain time (less than thirty days from the time title was made good), which demand was acquiesced in by the vendees' agent at the time, but was not complied with, whereupon the deeds were returned to and destroyed by the owner, who refused to complete the sale; since the contract relied upon was never approved or ratified by the owner, who made his own contract which was terminated on failure to complete the same on time. *Valentine v. Carter*..... 141
2. **SAME—RATIFICATION.** The fact that, after suit brought, the owner learned of the agent's contract and that \$500 earnest money had been paid to his agents, would not require him to return the money or constitute a ratification of the sale, where he had not received any of the money, and return thereof had never been demanded. *Valentine v. Carter*..... 141
3. **SPECIFIC PERFORMANCE—GIFTS—PROMISE TO CONVEY LAND—ACCEPTANCE BY ACTING UPON.** A letter written to a brother in California asking "if he would be willing to make" his home with the writer in consideration of a deed of her home in Washington, supplemented by another setting forth the serious illness of the donor and urging him to come to her for the purpose of settling up her affairs, and which was accepted by letter as a gift on the conditions named, is a promise to make a gift which will be specifically enforced, when acted upon by the donee, with possession taken, and material changes made in his condition on the faith thereof. *Coleman v. Larson*..... 321
4. **SAME—INTENT OF DONOR—EVIDENCE.** The fact that, after the arrival of the brother, the donor made him a deed of a portion only of the property, and attempted to sell the balance against his protests, would not show that she only intended to promise to give him part of the two lots on which the house was situated, where the entire lots were described in the first offer. *Coleman v. Larson* .. 321
5. **SAME—ESTOPPEL—ACCORD AND SATISFACTION.** In such a case, the donee would not be estopped to assert his right to specific performance as to the whole tract, as against the donor's executor, by the acceptance and recording of a deed of part of the tract, delivered by the executor after the death of the donor, the donee having had no previous knowledge of such deed, and not accepting the same as a full settlement. *Coleman v. Larson*..... 321
6. **SPECIFIC PERFORMANCE—FORFEITURE—EXCUSE FOR DEFAULT.** Specific performance of a contract cannot be asked by a vendee who had refused to accept the contract for a defect in the description, after forfeiture by the vendor on account of such refusal. *Voight v. Fidelity Investment Co.*..... 612

STATES:

Ownership and disposal of tide lands, see PUBLIC LANDS.

STATUTES:

See FRAUDS, STATUTE OF.

Granting special privileges or immunities, see CONSTITUTIONAL LAW.
Payment of license fee, retroactive effect, see CORPORATIONS, 1.

Dismissal of action for failure to prosecute, construction of statute,
see CRIMINAL LAW, 3.

Establishment of township organization, majority vote, see ELECTIONS.

Discharge from custody of person acquitted on ground of insanity,
see INSANE PERSONS, 2.

Liens on logs and lumber, persons entitled, see LOGS AND LOGGING, 1.
Limiting expenditures for municipal purposes, see MUNICIPAL CORPORATIONS, 32, 34.

Limitation of action to enforce local assessment lien, implied repeal,
see MUNICIPAL CORPORATIONS, 23.

Assessment for public improvements, see MUNICIPAL CORPORATIONS,
13, 17.

Failure to file certificate of partnership, effect on contracts, see
PARTNERSHIP, 2.

1. STATUTES—ENACTMENT—VALIDITY. The penal code of 1881 having been enacted as an original bill, it is immaterial that the same was compiled by a commissioner who was without authority to prepare it. *In re Donnellan*..... 460
2. SAME—CONTINUATION OF PRIOR LAWS. The fact that an original bill embraces a portion of a prior law on the same subject does not make it a mere continuation of the prior law. *In re Donnellan*.. 460
3. STATUTES—SUBJECTS AND TITLES—NUMBER—EXPRESSION IN TITLE—CRIMES AND PUNISHMENTS. A general statute enacted as a complete penal code, relating to all ordinary crimes, entitled "an act relative to crimes and punishments and proceedings in criminal cases" does not violate the organic act (U. S. Rev. St., § 1924) which provides that every law shall embrace but one subject expressed in its title; and the act may include a statute making it a misdemeanor to open a theater on Sunday. *In re Donnellan*..... 460
4. SAME—SUBJECTS AND TITLES—EXPRESSION IN TITLE. An act entitled "an act defining certain crimes and declaring their punishment and amending the code of 1881 and certain statutes on the same subject" is sufficiently broad to include the re-enactment of a section of the code of 1881 providing a punishment for keeping open a theater on Sunday. *In re Donnellan*..... 460
5. STATUTES — TITLES AND SUBJECTS — SUFFICIENCY — RETROACTIVE LAWS. The title to Laws 1907, p. 348, "an act relating to the power of counties of the first class to construct or aid in the construction of canals," is not broad enough to include the provisions of section

STATUTES—CONTINUED.

- 3, validating prior acts of counties in that behalf under a prior invalid law; the constitutional requirement that no bill shall embrace more than one subject and that expressed in the title applying especially to enactments of a retroactive character. *State ex rel. Potter v. King County*..... 619
6. **SAME—REPEAL—INVALID RE-ENACTMENT OF PRIOR LAWS—EFFECT—REPEAL.** The insufficiency of the title of an act does not affect the validity of sections which were simply the re-enactment of valid existing laws, where the act expressly continues in force all acts relating to the same subject not repugnant to the provisions of the act. *In re Donnellan*..... 460
7. **STATUTES— IMPLIED REPEAL—MUNICIPAL CORPORATIONS—ORDINANCES—LAW OF ROAD.** An ordinance requiring vehicles going south to keep on the westerly side of the center of a street, and going north, on the easterly side, is not impliedly repealed by an ordinance to regulate the use and speed of automobiles which required that they keep to the right on meeting vehicles, and contained no repealing clause; since there is no express conflict and implied repeals are not favored. *Suell v. Jones*..... 582
8. **STATUTES—IMPLIED REPEAL.** The act of 1866 prohibiting the engaging of certain callings on Sunday was impliedly repealed by the act of 1881 covering the same subject. *In re Donnellan*..... 460
9. **STATUTES— IMPLIED REPEAL—INTOXICATING LIQUORS—LICENSE.** Bal. Code, § 2934, conferring authority to regulate, license, or prohibit the sale of intoxicating liquors, is not impliedly repealed by the later act, Bal. Code, § 1011, subd. 10, conferring authority to license sales for the purposes of regulation and revenue. *State ex rel. Pasco v. Superior Court*..... 268
10. **SAME—REPEALING PROVISIONS—EFFECT.** The penal code of 1881 is shown to be an independent act complete in itself by § 1295 repealing all former laws. *In re Donnellan*..... 460
11. **STATUTES—LAWS OF OTHER STATES—NECESSITY OF PLEADING.** In an action by a servant for personal injuries sustained in another state, it is proper to exclude evidence of the laws of such state relating to vice principals and fellow servants, where the same were not pleaded. *Ongaro v. Twohy*..... 93

STAY:

Pending appeal or writ of error, see APPEAL AND ERROR, 13-15.

STOCK:

Corporate stock, see CORPORATIONS.

Subscription to corporate stock as condition to right of condemnation, see EMINENT DOMAIN, 3.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 5, 6, 9.

STREET RAILROADS:

Injuries to passengers on alighting from cars, see **CARRIERS**, 4-6.

STREETS:

See **HIGHWAYS**.

SUBROGATION:

Rights of holder of delinquency certificate to assert lien in action to quiet title, see **MUNICIPAL CORPORATIONS**, 24.

SUBSCRIPTION:

To corporate stock, see **CORPORATIONS**, 9.

SUBSTITUTION:

Harmless error in substitution of party, see **APPEAL AND ERROR**, 38.

SUBTENANTS:

Right to enforce conditions in lease, see **LANDLORD AND TENANT**, 1, 2.

SUIT MONEY:

Allowance pending appeal, see **DIVORCE**.

SUMMONS:

See **PROCESS**.

In tax foreclosure proceedings, see **TAXATION**, 2, 4, 5, 6.

SUPERSEDEAS:

On appeal or writ of error, see **APPEAL AND ERROR**, 13-15.

SUPPLEMENTARY PLEADING:

See **PLEADING**, 6.

SUPPLEMENTARY PROCEEDINGS:

On execution, see **EXECUTION**.

SURGEONS:

See **PHYSICIANS AND SURGEONS**.

SURVEYS:

Conflict in location of right of way over lands purchased from state, see **RAILROADS**, 1.

TAXATION:

Payment of taxes as proof of adverse possession, see **ADVERSE POSSESSION**, 2.

Appealability of order vacating foreclosure judgment, see **APPEAL AND ERROR**, 3.

Right to appeal from order vacating tax judgment, parties in interest, see **APPEAL AND ERROR**, 4, 5.

Annual corporation tax, see **CORPORATIONS**, 1.

Liquor licenses, see **INTOXICATING LIQUORS**.

TAXATION—CONTINUED.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 4, 9-18, 20-24.

Acquiring adverse title to vendor at tax sale by purchaser in possession under contract for conveyance, see VENDOR AND PURCHASER, 8.

1. SAME—GROUNDS—ASSESSMENT ROLLS—DESCRIPTION OF PROPERTY—DECREE—EFFECT. Insufficiency in the description of property in one of the assessment rolls is not ground for setting aside a general county tax foreclosure, in view of Bal. Code, § 1767, making the judgment of foreclosure conclusive evidence of its regularity or validity as to defenses that might have been made, except where the tax was paid or the real estate not liable. *Tacoma Gas and Electric Light Co. v. Pauley*..... 562
2. TAXATION—FORECLOSURE—SUMMONS—SERVICE BY PUBLICATION—SUFFICIENCY. A summons by publication in a tax foreclosure is so indefinite that the judgment is void, where it fails to state the day upon which the service would be complete, as required by Bal. Code, § 1751, although the date of the first publication was stated. *Bauer v. Widholm* 310
3. TAXATION—JUDGMENT—DATE OF FILING CERTIFICATE—NUNC PRO TUNC ORDER CHANGING DATE—JURISDICTION. Where certificates of delinquency were, by the county treasurer, delivered to the county clerk for the express purpose of filing them, who failed to mark them as filed at that time, and they were temporarily withdrawn for the purpose of copying them until June 10th, when they were returned and marked filed as of that date, the court has power after judgment, by a *nunc pro tunc* order, to require the filing mark to be changed to May 9th, and it cannot be objected that the judgments were void because the certificates were not filed May 9th fifteen days before the date of the first publication of the summons, as required in order to give the court jurisdiction. *Peabody v. Meacham*... 381
4. TAXATION—DELINQUENCY CERTIFICATE—FORECLOSURE—SUMMONS—NAME OF OWNER—KNOWLEDGE OF OWNERSHIP. A tax foreclosure being a proceeding *in rem*, a published summons in a general county foreclosure need not be addressed to the several owners of the property taxed as they appear on the tax rolls, but it is sufficient if addressed to "Unknown" owners, where it appears that the property had changed hands several times, and had been variously assessed to different owners, and there was no showing of fraud or that the treasurer knew, when the delinquency certificate was issued, who the owner was. *Tacoma Gas and Electric Light Co. v. Pauley*... 562
5. SAME—SETTING ASIDE SALE—GROUNDS—OWNERS—KNOWLEDGE OF TAX. The fact that the owner of property wrote to the county treasurer asking for a statement of the delinquent taxes, and received no answer, is not ground for setting aside a tax title based upon a gen-

TAXATION—CONTINUED.

- eral county tax foreclosure in which the owner was not personally served or named in the summons published. *Tacoma Gas and Electric Light Co. v. Pauley*..... 562
6. **TAXATION—TAX JUDGMENT—VACATION—NOTICE TO PURCHASER.** A tax foreclosure judgment cannot be vacated after the tax sale without notice to the purchaser. *Pierce County v. Bunch*..... 599
7. **TAXATION—JUDGMENT—VACATION—NOTICE TO TAX TITLE HOLDER.** Notice of application to vacate a void tax foreclosure judgment must, after sale, be given to the purchaser holding the tax title, as the equitable assignee of the tax lien by virtue of the sale. *Ryno v. Snider*
8. **SAME—ACTION TO SET ASIDE TAX TITLE—TENDER OF TAX—NECESSITY—PAYMENT TO COUNTY TREASURER.** Under Bal. Code, §§5678-5680, a suit to recover possession of lands sold to satisfy a tax cannot be commenced without first paying or tendering to the person in possession claiming under the tax title the amount of the tax with interest, penalties and costs for which the land was sold; and the fact that the judgment had been irregularly vacated and the taxes were thereupon paid to the county treasurer does not alter the case. *Ryno v. Snider*..... 421

TENDER:

- Of taxes due as condition precedent to attack on tax title, see **TAXATION**, 8.
- Of deed as necessity to forfeiture of contract for nonpayment of installments, see **SELLER AND PURCHASER**, 4.
- Performance by vendee as condition precedent to action for failure to convey, see **SELLER AND PURCHASER**, 10.

THEATERS AND SHOWS:

- Closing on Sunday as within police power, see **CONSTITUTIONAL LAW**, 3.
- Closing theaters on Sunday, sufficiency of title of act, see **STATUTES**, 3, 4.

TICKETS:

- Ejection of passengers offering invalid tickets, see **CARRIERS**, 8-10.

TIDE LANDS:

See **PUBLIC LANDS**.

Parties defendant in action by lessee for trespass, see **TRESPASS**, 2.

TIMBER:

Cutting and floating of logs, see **LOGS AND LOGGING**.

TIME:

- For taking appeal or suing out writ of error, see **APPEAL AND ERROR**, 11.
For voluntary dismissal of action, see **DISMISSAL AND NONSUIT**.
Of rendition of judgment, see **JUDGMENT**, 1.
For entry of judgment, see **JUDGMENT**, 4, 5.
To assert possession and right to homestead, see **MORTGAGES**, 2.

TITLE:

- Estoppel by failure to assert title, see **ESTOPPEL**.
Removal of cloud, see **QUIETING TITLE**.
Of statutes, see **STATUTES**, 3-6.
Tax titles, see **TAXATION**, 5, 8.
Right of purchaser in possession under contract to acquire title adverse to vendor, see **VENDOR AND PURCHASER**, 8.

TORTS:

- See **NEGLIGENCE; LIBEL AND SLANDER**.
Injuries to passengers from operation of railway and street railway cars, see **CARRIERS**.
Liability for acts of officer, see **CORPORATIONS**, 8.
Damages, inadequate or excessive, see **DAMAGES**, 4-7.
Measure of damages, see **DAMAGES**, 2.
Malpractice, see **PHYSICIANS AND SURGEONS**.
Negligent operation of railroads, see **RAILROADS**, 2, 3.
Setting off damages for torts, see **SET-OFF AND COUNTERCLAIM**.

TOWNS:

- Establishment of township organization, majority vote, see **ELECTIONS**.

TRANSFER:

- Of stock on books of company, see **CORPORATIONS**, 4.

TRESPASS:

- Restraining trespass, see **INJUNCTION**, 1.
Upon tide lands, rights of lessee to ownership of clams, see **PUBLIC LANDS**, 4.
Upon rights of way by rival company, conflict between survey and location, see **RAILROADS**, 1.
Injuries to trespassers, see **RAILROADS**, 2.

1. **TRESPASS — CASUAL CHARACTER — CUTTING TIMBER.** Where a boundary line between two quarter section corners is in dispute, a land owner who adopts a line run on the magnetic variation called for in the field notes, without resorting to a proper method for determining the true line, is guilty of voluntary and not a casual or involuntary trespass, if he cuts timber on the adjoining tract. *Heybrook v. Index Lumber Co.*..... 378

TRESPASS—CONTINUED.

2. **TRESPASS—TIDE LANDS—PARTIES.** The state is not a necessary party defendant to an action by a lessee of state lands for a trespass thereon. *Sequim Bay Canning Co. v. Bugge*..... 127
3. **SAME—JOINT TRESPASS—PARTIES—JOINDER.** Where a timber company and a mill company were both owned and managed by the same individuals and are practically one concern and both were interested in the business of the removal of timber constituting a trespass, they may be joined in one action for damages for a joint trespass. *Heybrook v. Index Lumber Co.*..... 378

TRIAL:

- Waiver of objections to right of appeal, see **APPEAL AND ERROR**, 5.
- Mode of taking exceptions, waiver of objections, see **APPEAL AND ERROR**, 8.
- Necessity for objections in lower court, see **APPEAL AND ERROR**, 7, 8.
- Review as dependent on specifications in assignment of error, see **APPEAL AND ERROR**, 16.
- Review of rulings involving discretion of court, see **APPEAL AND ERROR**, 17, 21, 22.
- Presumption on appeal, see **APPEAL AND ERROR**, 20.
- Review of findings in trial by court, see **APPEAL AND ERROR**, 23, 24, 29.
- Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 30-38.
- Settlement of action without consent of attorney, see **ATTORNEY AND CLIENT**, 1.
- Instructions in action for injuries to passengers, see **CARRIERS**, 5.
- Continuance in civil actions, see **CONTINUANCE**.
- Of criminal prosecutions in general, see **CRIMINAL LAW**, 3.
- Instructions in action for personal injury, see **DAMAGES**, 2, 11, 12.
- Presumption as to reason for taking deposition, see **DEPOSITIONS**.
- Conclusiveness of findings as to necessity for condemnation, see **EMINENT DOMAIN**, 2.
- Entry of default judgment, see **JUDGMENT**, 2.
- Judgment notwithstanding verdict, see **JUDGMENT**, 3.
- Instructions in action for slander, see **LIBEL AND SLANDER**, 9.
- Instructions in actions for personal injuries to servant, see **MASTER AND SERVANT**, 2, 14-16.
- Instructions in action for injuries from collision with automobile, see **MUNICIPAL CORPORATIONS**, 30.
- Motions and grounds for new trial, see **NEW TRIAL**.
- Misconduct of counsel ground for new trial, see **NEW TRIAL**, 2, 3.
- Instructions as to contributory negligence in action for malpractice, see **PHYSICIANS AND SURGEONS**, 3, 4.
- Evidence and instructions admissible under pleadings, see **PLEADING**, 7.
- Amendment of pleading during trial, see **PLEADING**, 5.

TRIAL—CONTINUED.

Instructions as to contributory negligence of person killed on railway track, see RAILROADS, 3.

Attendance and examination of witnesses, see WITNESSES.

1. TRIAL—CONDUCT—PLEADING—ORAL DEMURREE—NECESSITY OF WRITTEN PLEADINGS. Where, after trial commenced, leave is granted to file a supplemental answer setting up a counterclaim, it is not error to require the trial to proceed, after the court had announced that a demurrer would be sustained, it being understood that it was so traversed by oral demurrer. *Veysey v. Thompson*..... 571
2. TRIAL—MISCONDUCT OF COURT—COMMENT ON EVIDENCE. The repetition by the court of a statement by a witness, for the purpose of further explanation from counsel, is not unlawful comment on the evidence. *State v. Clem*..... 273
3. TRIAL—MISCONDUCT OF JUDGE—COMMENT ON FACTS. It is unlawful comment for the judge to state what any one with common sense must say upon an issue. *Spencer v. Arlington*..... 121
4. TRIAL—CONDUCT—REOPENING—DISCRETION. It is discretionary to reopen a case for further evidence upon a showing that it was unknown to counsel, where the opposite party is given an opportunity to rebut the same. *Lueders v. Tenino*..... 521
5. SAME—PREJUDICE—INSTRUCTIONS—CURING ERROR. Prejudice will be presumed from repeating to the jury a comment made by the judge as to what any one with common sense would say as to one of the material issues of fact, and the same would not be cured by instructions that the jury are sole judges of the fact and should disregard indications made by the court or counsel. *Spencer v. Arlington*
6. TRIAL—ARGUMENT OF COUNSEL—READING LAW. It is not error to refuse to allow counsel to read statutes or judicial decisions as part of his argument to the jury. *Ryan v. Lambert*..... 649
7. TRIAL—QUESTION FOR JURY. Where the facts are admitted and show no negligence on the part of the defendant, the question is one of law for the court, and a verdict should be directed. *Johnson v. Great Northern R. Co.*..... 98
8. TRIAL—CONDUCT OF JUDGE—COMMENTS. The statement in an instruction to a jury that this is an action to recover money lost at gambling is not an unlawful comment on the evidence. *Crowley v. Taylor*
9. TRIAL—INSTRUCTIONS IN WRITING. The statute requiring instructions to the jury to be in writing, when so requested, is mandatory, and is not complied with by oral instructions taken down by a stenographer employed by the parties. *McIntosh v. Saw Mill Phoenix*

TRIAL—CONTINUED.

10. **SAME.** The proviso to laws 1903, p. 120, that injury must be shown to justify a reversal for the refusal of an instruction or ruling, has no application to the requirement that instructions shall be given in writing when so requested. *McIntosh v. Saw Mill Phoenix* 152
11. **SAME—INSTRUCTIONS AS TO PREPONDERANCE OF EVIDENCE.** An instruction requiring proof of a certain fact by the preponderance of the evidence, and authorizing recovery if such fact is proved to the satisfaction of the jury, is not objectionable as authorizing a recovery upon proof to the jury's satisfaction without proof by the preponderance of the evidence. *Childs v. Childs* 27
12. **TRIAL—INSTRUCTIONS—ISSUES RAISED BY EVIDENCE.** It is not error to instruct upon the issues raised by evidence admitted without objection, although the same may not have been raised by the pleadings. *Childs v. Childs* 27
13. **TRIAL—INSTRUCTIONS—EVIDENCE TO AUTHORIZE.** Instructions upon a theory as to an accident are properly refused if there was no evidence to sustain such theory. *Suell v. Jones* 582
14. **TRIAL—INSTRUCTIONS—REQUESTS.** Upon refusal to give an instruction because not requested in proper form, it is not prejudicial error to fail to prepare and give another instruction on the same subject. *Ramm v. Hewitt-Lea Lumber Co.* 263
15. **SAME.** It is not error to refuse an instruction where the point was covered in the general charge. *Ramm v. Hewitt-Lea Lumber Co.* 263
16. **TRIAL—DECISION—REVIEW—FINDINGS.** In view of Bal. Code, § 5029, requiring the court on trial of issues of fact to give its decision in writing, the oral opinion of the court, delivered at the conclusion of the testimony, that judgment should go for the defendant, does not preclude the court from afterward deciding to enter written findings and a judgment in favor of the plaintiff; as until the decision is made in writing it is under the control of the court. *Russell v. Schade Brewing Co.* 362
17. **TRIAL—NONSUIT—WAIVER OF OBJECTIONS—APPEAL—REVIEW.** A motion for a nonsuit is waived by proceeding with the trial, and the case will thereafter be reviewed on the entire testimony only. *Ryan v. Lambert* 649

TRUST COMPANIES:

Liability to stock subscriber upon abandonment of enterprise, see CORPORATIONS, 9.

Ratification of unauthorized investment of subscription to stock upon abandonment of enterprise, see PRINCIPAL AND AGENT.

TRUSTEES:

Authority on dissolution of corporation, see CORPORATIONS, 10.

TRUSTS:

Creation by will, see WILLS.

ULTRA VIRES:

Acts of corporation, see CORPORATIONS, 5, 6.

UNDUE INFLUENCE:

As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.

UNITED STATES:

Federal questions, see COURTS, 1.

UNLAWFUL DETAINER:

Certiorari to review order quashing writ of restitution, see CERTIORARI.

USURY:

1. USURY—CONTRACTS—CONSTRUCTION — REPAYING ADVANCEMENT. A contract is usurious on its face, where it recites that plaintiff advanced to the defendant \$287.50 for a cash payment on stock purchased by defendant, and agreed to assume defendant's note for \$200, in consideration of which the defendant agreed to sell the stock and repay the plaintiff \$650 within six months; and it is immaterial that plaintiff claims it was an agreement to divide the profits on the stock, when in fact the stock became worthless and was not sold. *Dale v. Duryea*..... 644

VACATION:

Of judgment, see JUDGMENT, 6.

Tax judgment, see TAXATION, 5-8..

VALUE:

Of attorney's services, see ATTORNEY AND CLIENT, 2.

Competency of evidence showing value of property, see EVIDENCE, 3.
Of homestead, waiver of right to object to statutory excess, see MORTGAGES, 3.

Value of property as basis for local improvement assessment, see MUNICIPAL CORPORATIONS, 13-15.

VARIANCE:

Between pleading and proof in action for slander, see LIBEL AND SLANDER, 4, 6, 8.

Change in scheme as affecting validity of local improvement proceeding, see MUNICIPAL CORPORATIONS, 12.

VENDOR AND PURCHASER:

Purchase of land by broker in own interest, see BROKERS.

Memorandum to show conditions of deed delivered in escrow, see FRAUDS, STATUTE OF, 1.

VENDOR AND PURCHASER—CONTINUED.

Sale of county road upon appropriation by railway, see HIGHWAYS, 4.
Sale of community property, see HUSBAND AND WIFE, 3.

Sale and ownership of tide lands, see PUBLIC LANDS.

Conveyance of state lands to railroad, conflict between survey and
location of right of way, see RAILROADS, 1.

Transfers of ownership of personal property, see SALES.

Specific performance of contract, see SPECIFIC PERFORMANCE, 1, 2, 6.

1. **VENDOR AND PURCHASER—CONTRACT — SPECIFIC PERFORMANCE.** No binding contract of sale that can be specifically enforced against the owner is shown by a nonresident owner's letter offering to take \$800 net, and a telegram from the agent "offer accepted" without tender of the money, especially where the owner replied by wire that she was awaiting guarantee of the cash; and deposit of the cash in a bank with request for telegraphic acceptance of such deposit, is not sufficient to bind the sale where the owner never accepted such deposit, but, upon hearing thereof, answered that the lot was sold. *Foss Investment Co. v. Ater*..... 446
2. **SAME—BROKERS—AUTHORITY TO SELL.** A nonresident owner of real estate, who had listed her property for sale with a Philadelphia broker, is not bound by a contract of sale entered into by a local broker at Tacoma, Washington, for the price of \$800, subject to the owner's approval, where the local broker undertook to obtain the owner's consent to the sale by negotiations through the Philadelphia broker, who represented the deal as an offer of \$700 net to the owner, which she accepted, the real contract never having been submitted to her, and the agents never having been given any authority to make a binding contract of sale. *Foss Investment Co. v. Ater*
3. **SAME—RATIFICATION.** In such a case, the execution of a blank deed to close the deal would not amount to a ratification by the owner of the sale by the local brokers, where the deed was not sent to the local broker, and the owner never knew of his offer of \$800 for which the deed was secured. *Foss Investment Co. v. Ater*.. 446
4. **VENDOR AND PURCHASER — CONTRACT — CONCURRENT COVENANTS — FORFEITURE—TENDER OF DEED—NECESSITY.** In a contract of sale of land, a covenant to convey and a covenant to pay the first installment are not concurrent, where the deed was not to be made until years after on payment of the last installment, and tender of a deed is not necessary before forfeiture for nonpayment. *Voight v. Fidelity Investment Co.*..... 612
5. **VENDOR AND PURCHASER—CONTRACT TO CONVEY — ABANDONMENT—FORFEITURE—SPECIFIC PERFORMANCE.** A contract for the conveyance of land must be considered abandoned by the vendee, where, after making a payment of \$100 and agreeing to pay \$100 every six months, and all taxes, he made no further payments, paid no taxes, and quit the possession, for three years, and service of declaration of

VENDOR AND PURCHASER—CONTINUED.

- forfeiture upon him had become difficult by reason of his change of residence; hence specific performance will not be decreed upon his subsequent offer to perform. *Voight v. Fidelity Investment Co.*.. 612
6. VENDOR AND PURCHASER—CONTRACTS—PERFORMANCE. A contract by a vendee to build a mill on the property purchased by January 1st, 1907, is substantially complied with so as to avoid the payment of \$20,000 stipulated damages for failure to do so, where it appears that the contract stipulated that if the vendee failed to secure reasonable assurance of the construction of a spur track to the mill from a railroad company, then it should have fourteen months from and after receiving such assurance within which to complete the contract, and it appeared that the vendee only received an expression of opinion and no positive assurance as to the spur track until April 15, 1906, and completed the mill April 27, 1907. *Bowen v. Dempsey Lumber Co.*..... 690
7. SAME—ABILITY TO PERFORM—EVIDENCE—SUFFICIENCY. A finding that a vendee was not able to perform his part of a contract calling for certain payments is not warranted by evidence that he had arranged to secure the money from a third party, as the same would be *prima facie* evidence of ability to perform. *Munson v. McGregor* .. 276
8. VENDOR AND PURCHASER—PURCHASER IN POSSESSION—ACQUIRING TITLE ADVERSE TO VENDOR. Purchasers in possession under a contract for a conveyance, who have failed to pay the taxes as agreed, resulting in a tax sale, cannot acquire the title from the purchaser at a tax sale, as against their vendor, although they had no notice of the tax sale until long thereafter and were not in collusion with the purchaser. *Finch v. Noble*..... 578
9. VENDOR AND PURCHASER—FAILURE TO CONVEY—REMEDIES OF VENDEE—EVIDENCE OF PERFORMANCE—PRINCIPAL AND AGENT—AUTHORITY OF AGENT. In an action for damages for breach of a vendor's agreement to convey property sold to the plaintiff, evidence that the vendor's agent requested further time on behalf of the plaintiff, and stated that plaintiff refused to complete the purchase, is inadmissible and insufficient to support findings in favor of the defendant vendor as to the vendee's nonperformance, where it appears that the agent was not authorized to represent or bind the plaintiff. *Munson v. McGregor*..... 276
10. SAME—NECESSITY OF TENDER BY PURCHASER. A tender of performance by a vendee is not necessary before bringing action for damages for the vendor's failure to convey, where the vendor had sold the property to another and put it out of his power to perform his contract. *Munson v. McGregor*..... 276
11. SAME—BREACH BY VENDOR—DAMAGES. Upon a vendor's refusal to convey property and a wrongful sale thereof to a third person at an advanced price, the best evidence of the vendee's damages

VENDOR AND PURCHASER—CONTINUED.

may be the excess of the advanced price, plus earnest money paid, where there was evidence that the value exceeded the contract price and the property was of a fluctuating value. *Munson v. McGregor* 276

VENUE:

1. **VENUE—ACTION AGAINST CORPORATION—RESIDENCE—CONSENT OF CODEFENDANT.** Where an action was commenced against a corporation in the wrong county, in which it had no agent or place of business, the fact that another proper party defendant was served in another county and defaulted does not confer jurisdiction over the corporation, when it is not made to appear that the consenting co-defendant was a resident of the county in which the action was brought. *Whitman County v. United States Fidelity & Guaranty Co.* 150

VERDICT:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 25-28.

Review in criminal prosecutions, see **CRIMINAL LAW**, 5.

Excessive damages, see **DAMAGES**, 4-7.

VICE PRINCIPALS:

See **MASTER AND SERVANT**, 3, 9.

VIEW:

View and report on proposed highway by deputy engineer, see **COUNTIES**, 1.

VOLUNTARY TRESPASS:

See **TRESPASS**, 1.

WAIVER:

See **ESTOPPEL**.

Objections to right of appeal, see **APPEAL AND ERROR**, 5.

Of exceptions or objections, see **APPEAL AND ERROR**, 7, 8.

Of objections to excess value of homestead during period of redemption, see **MORTGAGES**, 3.

Of right to offset damages against assessment for benefits, see **MUNICIPAL CORPORATIONS**, 9.

Of motion for nonsuit, see **TRIAL**, 17.

WAREHOUSEMEN:

Destruction of goods by fire pending delivery, see **CARRIERS**, 1, 2.

WARNING:

Conclusions as to warnings given servant, see **EVIDENCE**, 7.

Duty of vice principal to give warning of danger, see **MASTER AND SERVANT**, 3.

WARRANTS:

Liability of general fund for warrants drawn against special fund for local improvement, see **MUNICIPAL CORPORATIONS**, 8.

WARRANTY:

On sale of goods, see **SALES**, 3, 4, 6.

WATERS AND WATER COURSES:

Acquisition of water supply, submission to vote, see **MUNICIPAL CORPORATIONS**, 3, 31-34.

Waters capable of navigation as public highways, see **NAVIGABLE WATERS**.

1. **WATERS AND WATER COURSES—PUBLIC SUPPLY—RIGHTS OF PRIVATE CONSUMERS—REGULATIONS.** Where the owner of premises, supplied with water by a private service which was unsatisfactory and unsuitable for permanent use, petitioned a public service corporation to extend its service to his property, and the water company, while extending its mains at great expense, purchased and temporarily used the private system until the new service was ready, the owner cannot insist upon a continuance of the old private service, or to a supply through the new service, without the payment of the cost of making connections, as charged to other customers of the water company under reasonable rates and regulations. *State ex rel. Foley v. Hillyard Water Co.*..... 232

WILLS:

1. **WILLS—CONSTRUCTION—ESTATE DEVISED — TRUSTS — DESCENT AND DISTRIBUTION—RIGHTS OF LEGATEES AND EXECUTOR.** The title to lots does not vest in legatees upon the death of the testator, as provided by Bal. Code, § 4640, in the case of a devise, where a nonintervention will provides that one-half of the proceeds of the interest in certain lots remaining unsold at the testator's death shall "when sold" belong to a daughter, and the other half to be invested to make a fund for a son on arriving at majority; since the intention is clear, and is to be implied, that the lots were to be conveyed and the proceeds divided by the executor, who is a trustee for all purposes necessary to execute the will. *Martin v. Moore*..... 288

WITNESSES:

Absence of witnesses as ground for continuance, see **CONTINUANCE**, 1. Opinions, see **EVIDENCE**, 7.

1. **WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED.** In an action by an administrator to recover money paid by the deceased upon a settlement, a question as to what transpired at the settlement and all about it, is objectionable, as calling for statements made by the deceased, contrary to Bal. Code, § 5991. *Moylan v. Moylan*

WITNESSES—CONTINUED.

2. **WITNESSES—EXAMINATION—UNWILLING WITNESS.** Liberality should be allowed upon the examination of unwilling witnesses called to testify against their own interests. *Miller v. Denman*..... 217
3. **WITNESSES—CROSS-EXAMINATION.** It is proper to exclude cross-examination of a party as to what he would have done under supposed circumstances which did not exist. *Russell v. Schade Brewing Co.* 362
4. **WITNESSES—REDIRECT EXAMINATION.** It is not error to receive evidence concerning the amount of travel upon a street subsequent to the accident, upon redirect examination of the plaintiff as to matters opened up on cross-examination. *Larsen v. Sedro-Woolley*.. 134
5. **WITNESSES—IMPEACHMENT—FOUNDATION.** Evidence of prior statements of a witness are inadmissible for the purpose of impeachment where no foundation therefor was laid. *Larsen v. Sedro-Woolley* 134

WOODS AND FORESTS:

Voluntary trespass in wrongful cutting of timber, see **TRESPASS**, 1.

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

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Necessity for written pleadings, oral demurrer, see **TRIAL**, 1.

Necessity for written instructions, see **TRIAL**, 9, 10.

WRITS:

See **CERTIORARI**; **INJUNCTION**; **MANDAMUS**; **PROCESS**.

